No. 93-744-CFX
Status: GRANTED

Docketed:
November 10, 1993

Title: Director, Office of Workers' Compensation Programs, Department of Labor, Petitioner
v.
Greenwich Collieries, et al.
and
Director, Office of Workers' Compensation Programs, Department of Labor, Petitioner
v.
Maher Terminals, Inc.

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Solicitor General, Solicitor General

Counsel for respondent: Bagnato,John J., Walter,Daniel G., Stearns,Joseph T., Rooney,Philip J.

Time to file ext by J. Souter to & inc. Nov. 10, 1993 CITED. 2nd case: Director, Office of Workers' Compensation Programs, Department of Labor, Petitioner v. Maher Terminals, Inc., CA3 No. 92-3222 April 19, 1993. Reh Den June 25, 1993. Time to file ext by DHS as above.

Entry	Date	Note	Proceedings and Orders
1	Sep 13 1993	G	Application (A93-256) to extend the time to file a petition for a writ of certiorari from September 23, 1993 to October 25, 1993, submitted to Justice Souter.
5	Sep 13 1993		Application for extension of time to file petition and order granting same until October 25, 1993 (Souter, September 15, 1993).
2	Sep 15 1993		Application (A93-256) granted by Justice Souter extending the time to file until October 25, 1993.
3	Oct 15 1993	G	Application (A93-256) to extend further the time to file a petition for a writ of certiorari from October 25, 1993 to November 10, 1993, submitted to Justice Souter.
6	Oct 15 1993		Application for further extension of time to file petition and order granting same until November 10, 1993 (Souter, October 18, 1993).
4	Oct 18 1993		Application (A93-256) granted by Justice Souter extending the time to file until November 10, 1993.
7	Nov 10 1993	G	Petition for writ of certiorari filed.
9	Dec 8 1993		Order extending time to file response to petition until December 22, 1993.
10	Dec 8 1993		This extension is granted for all respondents.
11	Dec 10 1993		Brief of respondent Maher Terminals, Inc. in opposition filed. VIDED.
12	Dec 21 1993		Brief of respondent Greenwich Collieries in opposition filed. VIDED.
13	Dec 29 1993		DISTRIBUTED. January 14, 1994 (Page 1)
14	Jan 12 1994	X	Reply brief of petitioner filed.
15	Jan 14 1994		Petition GRANTED.

****

No. 93-744-CFX

Entry	Date	Note	Proceedings and Orders
16	Feb 17 1994		Record filed.
		*	Partial proceedings U. S. Court of Appeals for the Third Circuit(GREENWICH COLLIERIES AND MAHER TERMINALS) (BOX)
17	Feb 28 1994		Joint appendix filed.
18	Feb 28 1994		Brief of petitioner Director, Office of Workers Compensation Programs filed.
19	Feb 28 1994		Brief of respondent Pasqualina Santoro in support of petition filed.
20	Mar 4 1994		CIRCULATED.
21	Mar 7 1994		SET FOR ARGUMENT MONDAY, APRIL 25, 1994. (1ST CASE).
22	Mar 11 1994	D	Motion of respondent Maher Terminals, Inc. for divided argument filed.
23	Mar 11 1994	D	Motion of respondent Santoro for divided argument filed.
24	Mar 21 1994		Motion of respondent Maher Terminals, Inc. for divided argument DENIED.
25	Mar 21 1994		Motion of respondent Santoro for divided argument DENIED.
26	Mar 30 1994	X	Brief amici curiae of National Association of Waterfront Employers, et al. filed.
27	Apr 1 1994	X	Brief amicus curiae of American Insurance Association filed.
28	Apr 1 1994	X	Brief of respondent Maher Terminals, Inc. filed.
29	Apr 1 1994	X	Brief of respondent Greenwich Collieries filed.
31	Apr 1 1994	X	Brief amicus curiae of National Coal Association filed.
30	Apr 4 1994		Record filed.
		*	Original proceedings United States Department of Labor Agency Record (GREENWICH COLLIERIES).
32	Apr 6 1994		Record filed.
		*	Original proceedings United States Department of Labor Agency Record (MAHER TERMINALS)
33	Apr 7 1994	D	Motion of respondent Greenwich Collieries for reconsideration of order denying motion for divided argument filed.
34	Apr 14 1994		Response of Maher Terminals, Inc. to Motion of Greenwich Collieries for Reconsideration of Order Denying Motion for Divided Argument filed.
35	Apr 18 1994		Motion of respondent Greenwich Collieries for reconsideration of order denying motion for divided argument DENIED. Counsel for respondent Greenwich Collieries is designated to present oral argument on behalf of respondents.
36	Apr 18 1994	X	Reply brief of petitioner Director, Office of Workers Compensation Programs filed.
37	Apr 25 1994		ARGUED.

93-744

No. ~

Supreme Court, U.S.
FILED
NOV 10 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

v.

GREENWICH COLLIERIES

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

v.

MAHER TERMINALS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

88 pp

QUESTION PRESENTED

In adjudicating benefits and claims under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act, the Department of Labor has long applied a "true doubt" rule, under which doubts on factual issues are resolved in favor of a claimant when the evidence is otherwise in equipoise. The question in these cases is whether use of the "true doubt" rule contravenes the Department's own regulations or Section 7(c) of the Administrative Procedure Act.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the captions, Andrew Ondecko was the claimant and a party to the proceedings below in *Greenwich Collieries*, and Pasqualina Santoro was the claimant and a party to the proceedings in *Maher Terminals*. Mrs. Santoro has filed a separate petition for a writ of certiorari, No. 93-474; Maher Terminals, Inc. has filed a cross-petition for a writ of certiorari in that case, No. 93-666.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement	4
A. Greenwich Collieries v. Director, OWCP	4
B. Maher Terminals, Inc. v. Director, OWCP	8
Reasons for granting the petition	13
Conclusion	29
Appendix A	1a
Appendix B	17a
Appendix C	24a
Appendix D	47a
Appendix E	49a

TABLE OF AUTHORITIES

Cases:

Adkins v. *Director, OWCP*, 958 F.2d 49 (4th Cir. 1992)	26
Alameda County Training & Employment Bd. v. *Donovan*, 743 F.2d 1267 (9th Cir. 1984)	21, 28
Avondale Shipyards, Inc. v. *Kennel*, 914 F.2d 88 (5th Cir. 1990)	13, 14, 27
Bath Iron Works Corp. v. *White*, 584 F.2d 569 (1st Cir. 1978)	13, 28
Betz v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805 (1981)	15-16
Bonessa v. *United States Steel Corp.*, 884 F.2d 726 (3d Cir. 1989)	15
Brown v. *I.T.T./Continental Baking Co.*, 921 F.2d 289 (D.C. Cir. 1990)	27
Collins v. *Old Ben Coal Co.*, 861 F.2d 481 (7th Cir. 1988)	19

Cases—Continued: Page

Dazzio v. *FDIC*, 970 F.2d 71 (5th Cir. 1992) 21, 27
Del Vecchio v. *Bowers*, 296 U.S. 280 (1935)..... 10, 16
Environmental Defense Fund, Inc. v. *EPA*, 548 F.2d 998 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977) 21, 28
F.H. McGraw & Co. v. *Lowe*, 145 F.2d 886 (2d Cir. 1944) 14, 27
Fidelity & Casualty Co. v. *Burris*, 59 F.2d 1042 (D.C. Cir. 1932) 11, 13, 14
Freeman United Coal Mining Co. v. *OWCP*:
988 F.2d 706 (7th Cir. 1993) 7, 13, 15, 18, 19, 21, 26, 27
999 F.2d 291 (7th Cir. 1993) 27
Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) 17
Greer v. *Director, OWCP*, 940 F.2d 88 (4th Cir. 1991) 15
Grizzle v. *Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993) 26, 27
Hazardous Waste Treatment Council v. *United States EPA*, 886 F.2d 355 (D.C. Cir. 1989), cert. denied, 498 U.S. 849 (1990) 21, 28, 29
Jones v. *Director, OWCP*, 977 F.2d 1106 (7th Cir. 1992) 14
Kowalchick v. *Director, OWCP*, 893 F.2d 615 (3d Cir. 1990) 15
Lesicko v. *Peabody Coal Co.*, 1 Black Lung Rep. (MB) 1-87, aff'd on reconsideration, 1 Black Lung Rep. (MB) 1-276 (Ben. Rev. Bd. 1977), rev'd, 581 F.2d 121 (7th Cir. 1978) 15
Maine v. *United States Dep't of Labor*, 669 F.2d 827 (1st Cir. 1982) 21, 28
Malacusky v. *Director, OWCP*, No. 92-BLA-1642, 1993 BLA LEXIS 1272 *6 (ALJ Aug. 6, 1993) 28
Merritt v. *United States*, 960 F.2d 15 (2d Cir. 1992) 21, 27

Cases—Continued: Page

Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 4, 5, 19, 20, 25, 26
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983) 7, 11, 17, 20, 21
Noble Drilling Co. v. *Drake*, 795 F.2d 478 (5th Cir. 1986) 14
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) 17
Old Ben Coal Corp. v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975) 21, 29
Parsons Corp. v. *Director, OWCP*, 619 F.2d 38 (9th Cir. 1980) 13, 14, 27
Pauley v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991) 17
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 18, 26
Provance v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483 (Ben. Rev. Bd. 1978) 15
St. Mary's Honor Center v. *Hicks*, 113 S. Ct. 2742 (1993) 16
Skukan v. *Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993) 15, 20, 21, 26, 27
Southern Pac. Co. v. *Sheppeard*, 112 F.2d 147 (5th Cir. 1940) 14
Southern S.S. Co. v. *Norton*, 101 F.2d 825 (3d Cir. 1939) 14
Steadman v. *SEC*, 450 U.S. 91 (1981) ... 12, 17, 22, 24
Stinson v. *United States*, 113 S. Ct. 1913 (1993) 20
Voris v. *Eikel*, 346 U.S. 328 (1953) 17

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*
5 U.S.C. 551-559 24
5 U.S.C. 554 24

Statutes, regulations and rule—Continued: Page

5 U.S.C. 554 *et seq.* 24
5 U.S.C. 556(d) (§ 7(c)) ..... *passim*
5 U.S.C. 559 (§ 12) 24
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 3, 4, 13
30 U.S.C. 902(b) 5
30 U.S.C. 902(f) 18
30 U.S.C. 902(f)(1)(A) 6
30 U.S.C. 921(c)(1) 5
30 U.S.C. 932(a) 7, 14, 17, 24
30 U.S.C. 936(a) 18
30 U.S.C. 956 24
30 U.S.C. 957 18
Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.* 29
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 4, 13
§§ 19-21, 33 U.S.C. 919-921 14
§ 19(d), 33 U.S.C. 919(d) 3, 16, 24
§ 20(a), 33 U.S.C. 920(a) 9, 10, 11, 16
§ 21(c), 33 U.S.C. 921(c) 7, 11
§ 23(a), 33 U.S.C. 923(a) 16
20 C.F.R.:
Pt. 718 ..... 20, 24, 25
Section 718.2 7
Section 718.3(c) 3, 18, 20, 24, 25
Section 718.202(a) 25
Section 718.203(a) 5
Section 718.203(b) 5
Section 718.204(b) 6
Section 718.204(c)(1)-(4) 6
Section 718.403 ..... 3, 4, 7, 8, 19, 20, 26
Pt. 725 24
Section 725.4(a) 24
Section 725.410 5
Sections 725.421 *et seq.* 5

Regulations and rule—Continued: Page

Section 725.452(a) 3, 24
Section 725.481 6
Pt. 727 25
Section 727.200 7
Section 727.203 7
Section 727.203(a) 25
Fed. R. Evid. 301 16

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947) 21
Black's Law Dictionary (6th ed. 1990) 20
3 Kenneth C. Davis, *Administrative Law Treatise* (2d ed. 1980) 21
Employment Standards Admin., U.S. Dep't of Labor, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* (1983) 19
Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1991*, at 22 (1992) 28
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 21, 23
S. Rep. No. 752, 79th Cong., 1st Sess. (1945) .. 21, 23
S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 18, 19
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) ... 17
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) .. 19
N. Snyder & M. Solomons, *Black Lung—A Study In Occupational Disease Compensation* (1976), reprinted in *Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. (1976) 18

Miscellaneous—Continued: Page

4 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, *Administrative Law* (1993) 21

9 John H. Wigmore, *Evidence* (Chadbourn rev. ed. 1981) 19, 20, 23

In the Supreme Court of the United States

OCTOBER TERM, 1993

NO.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs of the Department of Labor, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Greenwich Collieries* v. *Director, Office of Workers' Compensation Programs* (App., *infra*, 1a-16a) is reported at 990 F.2d

730. The decision of the Benefits Review Board in that case (App., *infra*, 17a-23a) is unreported, as is the decision of the administrative law judge (App., *infra*, 24a-46a).

The opinion of the court of appeals in *Maher Terminals, Inc.* v. *Director, Office of Workers' Compensation Programs* (93-474 Pet. App. A1-A16)[1] is reported at 992 F.2d 1277. The decision of the Benefits Review Board in that case (93-474 Pet. App. A17-A25) is unreported, as are the decisions of the administrative law judge (93-474 Pet. App. A26-A46).

JURISDICTION

The court of appeals entered its judgment in *Greenwich Collieries* on March 23, 1993, and in *Maher Terminals* on April 19, 1993. The court denied petitions for rehearing in both cases on June 25, 1993. App., *infra*, 47a-50a. On September 15, 1993, and October 18, 1993, Justice Souter extended the time for filing a petition for a writ of certiorari in both cases, first to October 25, 1993, and then to November 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

[1] "93-474 Pet. App." refers to the appendix to the petition for a writ of certiorari in *Santoro* v. *Maher Terminals, Inc.*, No. 93-474, which seeks review of the same decision of the court of appeals.

2. Pertinent provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provide as follows:

20 C.F.R. 718.3(c) provides:

> In enacting [the Black Lung Benefits] Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

20 C.F.R. 718.403 provides:

> Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

20 C.F.R. 725.452(a) provides in pertinent part:

> Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq.

3. Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(d), provides in pertinent part:

> Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be

conducted in accordance with the provisions of section 554 of title 5.

STATEMENT

This case concerns the validity of a principle of adjudication—the "true doubt" rule—that the Department of Labor has for many years applied in resolving benefits claims under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* That rule provides that when evidence submitted by the claimant and by the party opposing an award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant. See, *e.g.*, *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 144 n.12 (1987) ("The Benefits Review Board (BRB) 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.' *Lessar* v. *C.F. & I. Steel Corp.*, 3 BLR 1-63, 1-68 (1981)."); App., *infra*, 4a, 19a & n.3. In these cases, the court of appeals held that application of the "true doubt" rule is inconsistent with this Court's decision in *Mullins Coal Co.* v. *Director, OWCP, supra*, with one of the Department's own regulations implementing the BLBA (20 C.F.R. 718.403), and with Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

A. *Greenwich Collieries* v. *Director, OWCP*

1. Andrew Ondecko, the claimant in *Greenwich Collieries*, worked as a coal miner for 31 years before applying for disability benefits under the BLBA. App., *infra*, 3a. The Department's Office of Workers' Compensation Programs (OWCP) initially denied benefits, and Ondecko requested a hearing before an administrative

law judge (ALJ). See 20 C.F.R. 725.410, 725.421 *et seq.* The ALJ determined that Ondecko had pneumoconiosis and was totally disabled by that disease, and she awarded benefits.[2] App., *infra*, 41a, 44a.

In finding the existence of pneumoconiosis, the ALJ considered 33 x-ray interpretations by five highly qualified experts.[3] App., *infra*, 40a-41a. One of those experts read five x-rays as positive for the disease; the others read the same and different films as negative. *Ibid.* The ALJ concluded, however, that "the fact that at least one [expert] repeatedly found evidence of pneumoconiosis [was] significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations." *Id.* at 41a. Because "[t]rue doubt is to be resolved in favor of the Claimant," the ALJ found that Ondecko had established the existence of the disease. *Ibid.*

In finding that the claimant was totally disabled by pneumoconiosis, the ALJ considered eight medical opinions, four of them supporting a finding of disability and four finding the claimant not disabled.[4] App., *infra*, 43a.

---

[2] The ALJ also found that the disease arose out of coal mine employment. See 30 U.S.C. 902(b) (definition of pneumoconiosis); 20 C.F.R. 718.203(a). That finding was based on an unrebutted statutory presumption of causation available to any miner with at least ten years of coal mine employment, and it was not challenged before the Benefits Review Board or the court of appeals. App., *infra*, 41a-42a. See 30 U.S.C. 921(c)(1); 20 C.F.R. 718.203(b).

[3] Of the 44 x-ray interpretations in the record, the ALJ considered the 33 provided by those with best objective qualifications—*i.e.*, those who were both Board-certified in radiology and specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis ("B-readers"). App., *infra*, 40a; see *id.* at 20a n.4; *Mullins Coal*, 484 U.S. at 145 n.16.

[4] A black lung claimant may establish total disability using pulmonary function tests, blood gas tests, proof of a characteristic heart condition, or the opinion of a physician exercising "reasoned

The ALJ recognized the qualifications of the four physicians who found no disability, but gave special consideration to the contrary opinion of the physician who had treated Ondecko for more than 20 years. *Id.* at 43a-44a. The ALJ concluded that "the fact that the Claimant's treating physician consider[ed] him totally disabled * * * raise[d] true doubt in face of the Employer's experts[']opinions," and she again resolved that doubt in favor of the claimant. *Id.* at 44a.

2. Greenwich Collieries appealed to the Department's Benefits Review Board, see 20 C.F.R. 725.481, which affirmed the ALJ's determination. App., *infra,* 17a-23a. The Board noted that negative x-ray interpretations are "not a trustworthy indicator of the absence of pneumoconiosis," and it agreed that the ALJ was not required to accept the negative interpretations solely because there were more of them. *Id.* at 19a. The Board then concluded that the ALJ had "properly discussed and weighed all relevant medical evidence" on the pneumoconiosis issue, and that because she "found the positive and negative interpretations by [expert] physicians * * * to be equally probative," she had properly resolved the question in Ondecko's favor under the "true doubt" rule. *Id.* at 19a-20a & n.3.

On the question of disability, the Board noted that the ALJ had "stated her basis for finding the evidence [on each side] equally probative," and it concluded that "her discussion of the medical evidence * * * supports the inference" that she had properly considered all of the

medical judgment." 20 C.F.R. 718.204(c)(1)-(4). Ondecko relied only on medical opinions. App., *infra,* 42a-44a. Under the BLBA, "total disability" means inability of a miner to do his usual coal mine work or work comparable to it. 30 U.S.C. 902(f)(1)(A); 20 C.F.R. 718.204(b). In this case, the claimant's usual coal mine work involved dragging pipes that weighed up to 150-200 pounds. App., *infra,* 42a n.10.

conflicting evidence. The Board declined to "reweigh the evidence or substitute its inferences" for those of the ALJ. App., *infra,* 22a.

3. The court of appeals vacated and remanded. App., *infra,* 1a-16a; see 30 U.S.C. 932(a) (incorporating 33 U.S.C. 921(c)). First, the court read this Court's decision in *Mullins Coal* to require that a claimant prove the existence of pneumoconiosis by a preponderance of the evidence. *Id.* at 5a-6a.[5] Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court of appeals held that application of the rule was inconsistent with *Mullins Coal.* It explicitly disagreed in this regard with the decision in *Freeman United Coal Mining Co.* v. *OWCP,* 988 F.2d 706 (7th Cir. 1993) (per curiam), which construed *Mullins Coal* to support use of the "true doubt" rule to prove pneumoconiosis. App., *infra,* 6a & n.3.

Second, the court held that 20 C.F.R. 718.403, which provides generally that "the burden of proving a fact alleged in connection with [a BLBA claim] shall rest with the party making such allegation," imposes on the claimant the burden of persuasion with respect to the matters in issue. App., *infra,* 8a-11a. Although the court acknowledged (*id.* at 8a-9a) this Court's statement in *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393, 404 n.7 (1983), that similar language in Section 7(c) of the APA, 5 U.S.C. 556(d), imposes only a burden of production, rather than persuasion, the court of appeals found the difference between the terms "burden of proving" (in Section 718.403) and "burden of proof" (in Sec-

[5] *Mullins Coal* construed the Department of Labor's "interim presumption" regulation, 20 C.F.R. 727.203, which applied to claims that were filed before the Department's permanent regulations became effective. See 20 C.F.R. 727.200. The permanent regulations apply to all claims, including the one at issue in *Greenwich Collieries,* filed after March 31, 1980. See 20 C.F.R. 718.2.

tion 7(c)) sufficient to distinguish this case from *Transportation Management*. App., *infra*, 9a-11a.

As a result of its construction of Section 718.403, the court found it unnecessary to address whether Section 7(c) of the APA independently allocated the burden of persuasion to the claimant. App., *infra*, 11a & n.4. The court did conclude, however, that Section 7(c) requires whichever party bears the burden of persuasion to establish each relevant point by a preponderance of the evidence. *Id.* at 12a-13a. Because the "true doubt" rule allows the claimant to prevail when the evidence is in equipoise, the court concluded that use of the rule violates Section 7(c) of the APA.[6] *Id.* at 13a-15a. The court thought it unclear, however, whether in the absence of the "true doubt" rule the ALJ would have found Ondecko's evidence sufficient under the preponderance of the evidence standard, and it therefore remanded the case to allow the ALJ to make that determination. *Id.* at 15a-16a.

B. *Maher Terminals, Inc.* v. *Director, OWCP*

1. Michael Santoro sustained a work-related back and neck injury on July 23, 1985, while employed by respondent Maher Terminals, Inc. 93-474 Pet. App. A3. Later, after having been treated and released to return to work, Santoro experienced increasing pain and numbness; by August 15, he was unable to get out of bed. *Id.* at A4. An examining physician at the hospital reported spinal cord swelling and irregularity, and a neurosurgeon, after reviewing test results and doing a follow-up examination, suspected a tumor in the spinal cord. *Id.* at A4, A19. Surgery in fact disclosed such a tumor, which

[6] The court noted that express statutory provisions may override the relevant provisions of the APA, but it concluded that the BLBA contains no such provision. App., *infra*, 13a n.5, 15a.

was identified as an astrocytoma, a rare form of nerve cancer. *Ibid.* Santoro became paraplegic and mute, and died in March 1986 from cardiac arrest caused by the astrocytoma. *Ibid.*

Santoro's widow, the claimant in *Maher Terminals* and petitioner in No. 93-474, filed a claim under the LHWCA, alleging that the July 1985 injury had rendered her husband totally disabled and caused his death. 93-474 Pet. App. A30, A35. She relied primarily on reports and testimony by the neurosurgeon, who concluded that trauma from the injury produced swelling, which significantly hastened Santoro's disability and death by aggravating a tumor that was previously dormant and might have remained so for many years. *Id.* at A31, A36-A37. The company's expert, a neurologist and pathologist who reviewed relevant records but never actually examined Santoro, testified that it was "medically impossible" that Santoro had suffered a severely traumatic neck injury in his accident at work. He was of the view that the tumor had erupted spontaneously, destroying the spinal cord "without reference to any external event." *Id.* at A31-A32, A38-A39.

The ALJ found that Santoro's widow had established both his injury and circumstances at work that could have caused the injury. 93-474 Pet. App. A30-A31. Under Section 20(a) of the Act, 33 U.S.C. 920(a), that showing raised a presumption of coverage and shifted to the employer the burden of producing "substantial evidence to the contrary"—*i.e.*, "evidence specific and comprehensive enough to sever the potential connection between the resultant impairment and work environment." 93-474 Pet. App. A31. The ALJ concluded that the testimony of the employer's expert was sufficient to rebut the statutory presumption, and proceeded to consider the case "on the basis of the record as a whole." *Id.* at A32.

After thoroughly reviewing the evidence, 93-474 Pet. App. A32-A44, the ALJ credited the neurosurgeon's opinion because it was "anchored in his experience as a hands-on neurosurgeon," but noted that some parts of his testimony appeared "inconsistent or contradictory" (*id.* at A37, A40, A44); similarly, he found the employer's expert highly qualified and persuasive (*id.* at A31-A32, A40), but rejected his conclusion that Santoro had suffered no neck injury (*id.* at A40) and questioned his opinion regarding the presence and possible effect of post-traumatic swelling (*id.* at A43-A44). On balance, the ALJ found the evidence of causation conflicting and equally probative; deeming the issue "arguable" and "debatable" even after careful weighing of the evidence, the ALJ invoked the "true doubt" rule and awarded benefits to the claimant. *Id.* at A39, A44; see also *id.* at A46 (order denying rehearing).

2. The Benefits Review Board affirmed. 93-474 Pet. App. A17-A24. Respondent argued before the Board that application of the "true doubt" rule in effect resurrected the presumption of causation initially provided by Section 20(a) of the LHWCA, 33 U.S.C. 920(a), whereas this Court held in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935), that that presumption "falls out of the case" after it is successfully rebutted by the employer. See 93-474 Pet. App. A20-A21. The Board rejected that argument, holding that the "true doubt" rule is consistent with *Del Vecchio* because it comes into play only after the ALJ has weighed all of the evidence (without regard to the rebutted statutory presumption) and found it evenly balanced. *Ibid.* The Board noted that the rule is "well-established" under the LHWCA, and declined to depart from it in this case. *Id.* at A21. After reviewing the evidence and the ALJ's opinion, *id.* at A21-A23, the Board found no error in the ALJ's analysis or his application of the "true doubt" rule, and it affirmed the award of benefits. *Id.* at A23.

3. The same panel of the Third Circuit that decided *Greenwich Collieries* also vacated the Board's decision in *Maher Terminals*. 93-474 Pet. App. A1-A16; see 33 U.S.C. 921(c). The court agreed with the Board that the ALJ had not relied improperly on the Section 20(a) presumption, *id.* at A6-A7, and it recognized that other courts had applied the "true doubt" rule under the LHWCA. *Id.* at A5-A6, A14-A15. Having traced the origins of the "true doubt" rule to the decision in *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932), however, it dismissed that decision's justification for the rule, based on the LHWCA's compensatory purposes, as having "no logical basis in the law." 93-474 Pet. App. A6. The court further held in this case (unlike in *Greenwich Collieries*) that Section 7(c) of the APA not only specifies a standard of proof (preponderance of the evidence), but affirmatively allocates the burden of persuasion under that standard to a benefits claimant. 93-474 Pet. App. A10. Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court concluded that its application violates the APA. *Id.* at A14, A15-A16.

The court of appeals acknowledged (93-474 Pet. App. A8) this Court's statement in *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 404 n.7, that Section 7(c) "determines only the burden of going forward, not the burden of persuasion." The court treated that statement as "dicta" (93-474 Pet. App. A8-A9), however, apparently because the specific burden-shifting issue in *Transportation Management* involved an affirmative defense, rather than the underlying unfair labor practice charge. The court distinguished the affirmative defense situation as a "logical exception" to what it considered the APA's general rule that a claimant must bear the burden of persuasion "on the subject of the litigation." *Id.* at A13-A14.

Similarly, the court of appeals concluded that despite its unrestricted language concerning the effect of Section 7(c), *Transportation Management* interpreted only the first sentence of that Section, which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 93-474 Pet. App. A7, quoting 5 U.S.C. 556(d). The court pointed out that in *Steadman* v. *SEC*, 450 U.S. 91, 98, 102 (1981), this Court construed the third sentence of Section 7(c) to require that administrative determinations governed by the APA be made in accordance with a "preponderance of the evidence" standard.[7] 93-474 Pet. App. A8-A9. Although it recognized that "*Steadman*, standing alone, does not allocate the burden of proof," the court reasoned that Section 7(c) prohibits issuance of an order except on a preponderance of the evidence. 93-474 Pet. App. A10. Because it viewed a benefits claimant as the party who "seeks to change the status quo," *ibid.*, the court concluded that Section 7(c) prohibits any such change based on the "true doubt" rule—*i.e.*, where the evidence is in equipoise, so that by definition the claimant has not supported her position with a preponderance of the evidence. 93-474 Pet. App. A14. In doing so, the court acknowledged that the legislative history of Section 7(c), "taken together with *Steadman*, suggests that the party who seeks a denial of relief is *also* required by section 7(c) to sustain such denial by a preponderance of the evidence." 93-474 Pet. App. A11.

The court of appeals explicitly rejected decisions of the First, Fifth, Ninth and District of Columbia Circuits

[7] The third sentence of Section 7(c) provides that "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

upholding the "true doubt" rule under the LHWCA, remarking only that those courts had "not seriously considered the applicability of the APA to the question at hand."[8] 93-474 Pet. App. A14-A15 (citing *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88 (5th Cir. 1990) (per curiam); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Bath Iron Works Corp.* v. *White*, 584 F.2d 569 (1st Cir. 1978); *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042 (D.C. Cir. 1932)). The court recognized that the opinion in *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706 (7th Cir. 1993) (per curiam), did consider the effect of the APA and upheld application of the "true doubt" rule under the BLBA. But the court nevertheless declined to follow *Freeman*, believing it to be inconsistent with this Court's decision in *Mullins Coal* and with the panel's previous decision in *Greenwich Collieries*.

As in *Greenwich Collieries*, the court thought it unclear whether, in the absence of the "true doubt" rule, the ALJ would have found Mrs. Santoro's evidence sufficient under the preponderance-of-the-evidence standard. It therefore vacated the decision of the Benefits Review Board with directions to remand the case to the ALJ to make that determination. 93-474 Pet. App. A16.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in invalidating use of the "true doubt" rule in adjudicating claims under the Black Lung Benefits Act (BLBA) and the Longshore and Harbor Workers' Compensation Act (LHWCA). The court failed to give proper deference to the Department of

[8] We quote the published text of the court's opinion, 992 F.2d at 1284, which differs somewhat from the text given in the appendix to the petition in No. 93-474.

Labor's longstanding practice in carrying out its responsibilities under those laws, to its construction of statutes it is charged with administering, and to its interpretation of its own regulations. Not surprisingly, the court's conclusions conflict with decisions of a number of other courts of appeals and with this Court's decision in *Transportation Management*. The conflicting appellate decisions on this issue will disrupt the Secretary's administration of two important workers' compensation schemes, each of which generates several thousand contested claims every year. Moreover, because the lower courts have acknowledged the conflict among their decisions, there is little chance that the matter will be resolved without intervention by this Court. For these reasons, review is warranted at this time.

1. For fifty years or more, administrators and federal courts—including the Third Circuit—reviewing claims for benefits under the LHWCA have applied the principle that "doubtful questions incapable of scientific solution are to be resolved in favor of the workman." *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 887 n.1, 888 (2d Cir. 1944) (quoting administrative decision). See also, *e.g.*, *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932); *Southern S.S. Co.* v. *Norton*, 101 F.2d 825, 827 (3d Cir. 1939); *Southern Pac. Co.* v. *Sheppeard*, 112 F.2d 147, 148 (5th Cir. 1940); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481 (5th Cir. 1986) (per curiam); *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990) (per curiam); *Jones* v. *Director, OWCP*, 977 F.2d 1106, 1109 (7th Cir. 1992). When Congress in 1969 enacted the legislation that became the BLBA, it incorporated many provisions of the LHWCA, including its procedures for the processing and adjudication of claims. 30 U.S.C. 932(a), incorporating, *inter alia*, 33 U.S.C. 919-921. Accordingly, the

Director of the Office of Workers' Compensation Programs, the Benefits Review Board, and the courts have applied to black lung cases the evidentiary rule developed under the LHWCA, resolving in favor of the claimant those factual questions on which the evidence is found to be in equipoise. See, *e.g.*, App., *infra*, 19a n.3; *Lesicko* v. *Peabody Coal Co.*, 1 Black Lung Rep. (MB) 1-87, 1-91 (Ben. Rev. Bd.), aff'd on reconsideration, 1 Black Lung Rep. (MB) 1-276, 1-282 (Ben. Rev. Bd. 1977), rev'd on other grounds, 581 F.2d 121 (7th Cir. 1978); *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben. Rev. Bd. 1978); *Skukan* v. *Consolidation Coal Co.*, 993 F.2d 1228, 1238 (6th Cir. 1993); *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 710 (7th Cir. 1993) (per curiam); *Greer* v. *Director, OWCP*, 940 F.2d 88, 90 & n.3 (4th Cir. 1991).[9]

The "true doubt" principle does not require that a claimant prevail merely because the evidence on a point is in conflict. Nor does it relieve the adjudicator of the obligation to weigh the claimant's evidence against other evidence in the record. The rule provides only that when the adjudicator finds that the evidence on each side is evenly balanced (taking account of both its quantity and its quality), the doubt finally remaining should be resolved in favor of the claimant. See, *e.g.*, App., *infra*, 19a n.3; *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) at 1-486. In the Secretary's view, an ALJ should find the evidence evenly balanced only in narrow circumstances, after carefully considering all the evidence and exhausting all methods of evaluating it. See also *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv.

[9] Indeed, prior to this case, the Third Circuit itself had approved use of this rule in black lung cases, just as it had under the LHWCA. See *Kowalchick* v. *Director, OWCP*, 893 F.2d 615, 621 (3d Cir. 1990); *Bonessa* v. *United States Steel Corp.*, 884 F.2d 726, 730 (3d Cir. 1989).

(MB) 805, 808 (1981) (before applying "true doubt" rule, ALJ "must indicate with some specificity what evidence he believes or disbelieves and why").[10] So understood, the "true doubt" rule is plainly permissible under the LHWCA, the BLBA, and the APA.

a. Claims adjudications under the LHWCA are governed generally by the APA, see 33 U.S.C. 919(d), but are otherwise to be conducted without regard to "common law or statutory rules of evidence or * * * technical or formal rules of procedure." 33 U.S.C. 923(a). As noted above, Section 20(a) of the Act, 33 U.S.C. 920(a), provides that in LHWCA proceedings, "it shall be presumed, in the absence of substantial evidence to the contrary[,] * * * [t]hat the claim comes within the provisions of [the Act]." See, *e.g.*, 93-474 Pet. App. A30-A31. If the employer comes forward with substantial evidence to rebut that presumption, the presumption itself drops from the case, and the finder of fact must consider all of the evidence and reach an independent conclusion. *Id.* at A31; *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935); compare *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2747 (1993); see also Fed. R. Evid. 301. Neither the Act nor the regulations prescribe which party shall bear the risk of non-persuasion in that final analysis. The "true doubt" rule represents, in effect, the Secretary's administrative judgment, developed in conjunction with and long accepted by the courts, that that risk should rest on the employer.

The "true doubt" rule is but one application of the more general principle that the LHWCA is a remedial

[10] In *Greenwich Collieries*, for example, the Director took the position in the court of appeals that the ALJ did not adequately weigh the medical evidence before finding "true doubt" on the question of the claimant's total disability, and suggested that the court remand the case for further proceedings on that issue. Gov't C.A. Br. 39, 42-45.

statute that should be construed liberally in favor of the employee or his dependents. See, *e.g.*, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). In addition, the rule draws support from the highly hazardous nature of longshoring, see S. Rep. No. 1125, 92d Cong., 2d Sess. 2 (1972); the likely relative resources and access to specialized evidence, such as expert medical testimony, of employers and injured employees; and the special rules historically fashioned to protect the rights of maritime workers. See *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 246-247 (1942). Under the circumstances, the Secretary's longstanding practice of imposing the risk of non-persuasion in close cases on the employer rather than the employee is based on a permissible construction and application of the LHWCA, and it is entitled to deference from the courts. See *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 402-403 (1983) (deferring to NLRB's allocation of evidentiary burdens); cf. *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534-2539 (1991) (deferring to Secretary's interpretation of black lung statute where issues involved "exercise of judgment grounded in policy concerns"); *Steadman* v. *SEC*, 450 U.S. 91, 103-104 (1981) (longstanding agency interpretation supports inference of congressional intent). And, as noted above, the "true doubt" rule has been uniformly accepted and applied by the courts for over half a century, until the Third Circuit's decision in this case.

b. The "true doubt" rule developed in the LHWCA context was carried over in the Department of Labor's implementation of the BLBA, which built on the provisions of the LHWCA. See 30 U.S.C. 932(a). The rule therefore deserves similar deference in the latter context. In addition, in the case of the BLBA, the rationale

giving rise to the rule is set out in the Act's implementing regulations, which are expressly authorized by the BLBA, 30 U.S.C. 902(f), 936(a) and 957. Thus 20 C.F.R. 718.3(c) states:

> Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent.

Both that general principle and the "true doubt" rule are consistent with Congress's expressed intentions. As other courts have recognized, the Senate Report accompanying the 1972 amendments to the BLBA stated that the statute "is intended to be a remedial law * * *. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S. Rep. No. 743, 92d Cong., 2d Sess. 11 (1972); see also, *e.g., Freeman United,* 988 F.2d at 709-710.[11] When Congress amended the statute again in 1978, the Senate report "underscore[d] and reaffirm[ed]" the Senate's earlier intent that doubts should be resolved in favor of the claimant, and stated that the Secretary of Labor (who first received authority to define "total disability" in 1978, see *Pittston Coal Group* v. *Sebben,* 488 U.S. 105, 110 (1988)) was expected to "promulgate standards which give the benefit of any doubt

[11] Following the 1972 amendments, the Department informed Congress, in discussing the "burden of proof" under the black lung statute, that "conflicts in the evidence are required to be resolved by the adjudicator in favor of the claimant." N. Snyder & M. Solomons, *Black Lung—A Study In Occupational Disease Compensation* 29, 30 (1976), reprinted in *Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 94th Cong., 2d Sess. 459, 487, 488 (1976).

to the coal miner." S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977); see *Freeman United,* 988 F.2d at 710 n.5.

Application of the "true doubt" rule also is sound as a matter of "policy and fairness based on experience in * * * different situations," the traditional grounds for assigning burdens of persuasion. 9 John H. Wigmore, *Evidence* § 2486, at 291 (Chadbourn rev. ed. 1981). Claimants have several disadvantages in black lung cases. They are often sick or elderly individuals with limited resources, see Employment Standards Admin., U.S. Dep't of Labor, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14-18 (1983), and "it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal mine related, or that those diseases are in fact pneumoconiosis." *Mullins Coal Co.* v. *Director, OWCP,* 484 U.S. 135, 158 (1987); see also *Collins* v. *Old Ben Coal Co.,* 861 F.2d 481, 489 (7th Cir. 1988) ("clinical tests used to detect pulmonary impairments may be fallible"); S. Rep. No. 743, *supra,* at 9 (x-rays are "an imperfect means of ascertaining the existence of pneumoconiosis in coal miners").

In rejecting the "true doubt" rule under the BLBA, the court of appeals mistakenly relied on Section 718.403 of the Secretary's regulations, which states:

> Except as provided in this subchapter [20 C.F.R. Parts 718-727], the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

The Secretary construes Section 718.403 to allocate only the burden of production, not the burden of persuasion. That construction of the Secretary's own regulation is neither plainly erroneous nor inconsistent with the regulation's language, and it therefore is entitled to

"controlling weight." *E.g., Stinson* v. *United States,* 113 S. Ct. 1913, 1919 (1993); see also *Mullins Coal,* 484 U.S. at 159.

As this Court held in *Transportation Management,* 462 U.S. at 404 n.7, and as even the court below recognized (App., *infra,* 8a-9a), the term "burden of proof" may refer to the burden of either production or persuasion. See also, *e.g., Black's Law Dictionary* 196 (6th ed. 1990); 9 John H. Wigmore, *supra,* §§ 2485-2488. The regulation's use of the phrase "burden of proving," rather than "burden of proof," is purely stylistic. The court of appeals' attempt to distinguish *Transportation Management* on the basis of that inconsequential difference (App., *infra,* 9a-11a) is wholly unpersuasive. Moreover, if Section 718.403 did allocate the burden of persuasion, it would conflict with Section 718.3(c), quoted above, which clearly states that the Part 718 regulations "[were] designed" and "shall be construed and applied" so as to give claimants "the benefit of all reasonable doubt" as to the existence of death or disability due to pneumoconiosis. See *Skukan,* 993 F.2d at 1238. And if there were any inconsistency between Sections 718.3(c) and 718.403, it would be resolved by the introductory clause in the latter provision: "Except as provided in this subchapter." Section 718.3(c), as construed by the Secretary, makes special provision for situations of "true doubt."

c. The court of appeals held in *Maher Terminals* that Section 7(c) of the APA, 5 U.S.C. 556(d), independently imposes the burden of persuasion on benefits claimants; and it held in both cases that so long as that burden rests on the claimant, application of the "true doubt" rule violates the APA's further requirement that the party bearing that burden prove his case by a preponderance of the evidence. We agree that the "true doubt" rule, in the narrow circumstances in which it applies,

allocates the risk of non-persuasion to the employer. That allocation however, does not contravene the APA.

As the court of appeals recognized (93-474 Pet. App. A9-A11), Section 7(c) addresses two separate questions: the burden imposed upon the proponent of a particular agency order, and what standard of proof must be met by whichever party bears the burden of persuasion. As discussed above, this Court has made it clear that Section 7(c)'s first sentence, which provides generally that "the proponent of a rule or order has the burden of proof," requires that the party advocating a particular result bear the burden of *production* with respect to that issue. *Transportation Management,* 463 U.S. at 404 n.7.[12] As to the second question, this Court has held that the third sentence of Section 7(c)—which provides that "[a] sanction may not be imposed or rule or order issued

---

[12] See also *Skukan,* 993 F.2d at 1235-1239; *Freeman United,* 988 F.2d at 711; *Dazzio* v. *FDIC,* 970 F.2d 71, 77 (5th Cir. 1992); *Merritt* v. *United States,* 960 F.2d 15, 18 (2d Cir. 1992); *Hazardous Waste Treatment Council* v. *United States EPA,* 886 F.2d 355, 366-368 (D.C. Cir. 1989) (per curiam), cert. denied, 498 U.S. 849 (1990); *Alameda County Training & Employment Bd.* v. *Donovan,* 743 F.2d 1267, 1269 (9th Cir. 1984) (per curiam); *Maine* v. *United States Dep't of Labor,* 669 F.2d 827, 829 (1st Cir. 1982); *Environmental Defense Fund, Inc.* v. *EPA,* 548 F.2d 998, 1004, 1013-1015 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977); *Old Ben Coal Corp.* v. *Interior Bd. of Mine Operations Appeals,* 523 F.2d 25, 39-40 (7th Cir. 1975) (opinion on denial of petition for rehearing); *Attorney General's Manual on the Administrative Procedure Act* 75 (1947); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946) (burden of proof means "that the party initiating the proceeding has the general burden of coming forward with a prima facie case"); S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945) (same); 4 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, *Administrative Law* § 24.02, at 24-21 n.3 (1993); 3 Kenneth C. Davis, *Administrative Law Treatise* § 16.9, at 257-258 (2d ed. 1980).

except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence"—generally requires that the party who bears the burden of persuasion on an issue must establish its position by a preponderance of the evidence. *Steadman* v. *SEC*, 450 U.S. at 98-102.

The court of appeals acknowledged as a possibility what is, in our view, the best reading of Section 7(c) in light of *Transportation Management* and *Steadman*: that "the APA * * * fails to allocate the burden of persuasion, which gives each administrative agency the discretion to do so without contravening the APA, provided that the party to whom it allocates the burden proves its case by a preponderance of the evidence." 93-474 Pet. App. A10. The court rejected that interpretation, however, on the ground that if the APA requires particular agency action to be supported by a preponderance of the evidence, "the inevitable conclusion is that the proponent of that order must bear the burden of persuasion." *Id.* at A11. That conclusion, however, is by no means "inevitable."

First, as the court of appeals recognized (93-474 Pet. App. A11), the legislative history of Section 7(c), read together with *Steadman*, provides equal support for the proposition "that the party who seeks a denial of relief is *also* required" to prove its case by a preponderance of the evidence. The resulting ambiguity is best accommodated not, as the court of appeals held, by placing the risk of non-persuasion always on the party seeking to change whatever happens to be the *status quo* at the time that the proposal for agency action arises, but by allowing an agency to determine, in light of the relevant considerations, which party should bear that risk in any particular statutory context.

Second, the "logical" exception that the court was forced to recognize for "affirmative defenses" (93-474 Pet. App. A14), like the defense at issue in *Transportation Management*, is in fact no more logical than the principle on which the Secretary relies here. That principle applies in the relatively uncommon instances in which an agency concludes, on the basis of its factual and policy expertise, that where both the proponent and the opponent of agency action have produced substantial probative evidence, and that evidence is in equipoise, the doubt should be resolved in favor of particular agency action.

Third, the court of appeals' decision, which *requires* agencies to allocate the risk of non-persuasion in the same manner regardless of the context or circumstances, itself contravenes the policy of the APA, which was not intended to impose undue restrictions on government operations. See 5 U.S.C. 556(d); S. Rep. No. 752, *supra*, at 5, 22; H.R. Rep. No. 1980, *supra*, at 16, 36. Allocation of the burden of persuasion in most civil litigation is a matter generally left to the courts, to be resolved as a matter of "policy and fairness based on experience in * * * different situations." 9 John H. Wigmore, *supra*, § 2486, at 291. No more restrictive policy should apply to administrative agencies under the APA.

d. Even if Section 7(c) of the APA were construed to bar an agency from applying an adjudicatory principle like the "true doubt" rule in other circumstances, it does not have that effect under the LHWCA. As explained above (see page 14, *supra*), the principle that doubts are to be resolved in favor of the claimant was firmly established as a rule of construction under the LHWCA when the APA was enacted. There is no indication that Congress intended the APA in effect to revise the LHWCA

by reversing that settled practice. To the contrary, Section 7(c) begins with the phrase "[e]xcept as otherwise provided by statute," thereby expressing an intent to preserve principles of proof and decisionmaking that had already developed under other statutory schemes. See *Steadman*, 450 U.S. at 103-104 (consistent pre- and post-APA practice is persuasive evidence of Congressional intent).

Similarly, in the case of the BLBA, the statute states that "[e]xcept as otherwise provided in this chapter [30 U.S.C. 801-962], the provisions of sections 551 to 559 and sections 701 to 706 of title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof." 30 U.S.C. 956. Thus, 5 U.S.C. 556(d) is expressly rendered inapplicable under the BLBA.[13] To be sure, 30 U.S.C. 932(a) incorporates certain provisions of the LHWCA, including 33 U.S.C. 919(d); and Section 919(d) provides that hearings under the LHWCA shall be conducted in accordance with 5 U.S.C. 554 (and might be read to contemplate the application of 5 U.S.C. 556(d) as well). Section 932(a) creates an "except[ion]," however, where "otherwise provided * * * by regulations of the Secretary." Although the Secretary's regulations generally provide that hearings shall be conducted in accordance with 5 U.S.C. 554 *et seq.*, see 20 C.F.R. 725.452(a), they too create an exception where "otherwise provided" in the regulations themselves. *Ibid*; see also 20 C.F.R. 725.4(a) (making "criteria and standards" of Part 718 applicable under Part 725). As we have explained (see pages 18, 20, *supra*), Section 718.3(c) of

[13] As the court of appeals acknowledged (93-474 Pet. App. A8 n.3), Section 12 of the APA, 5 U.S.C. 559, contemplates that statutes enacted after the APA may expressly supersede or modify 5 U.S.C. 551-559.

the regulations embodies the principle that the claimant shall be given the benefit of the doubt. Thus, in light of the statutory and regulatory exceptions under the BLBA, use of the "true doubt" rule under that statute likewise presents no conflict with Section 7(c) of the APA.

2. The decisions below misinterpret this Court's decision in *Mullins Coal* and conflict with decisions of other courts of appeals.

a. In *Greenwich Collieries*, the court of appeals read *Mullins Coal* to require that any black lung claimant establish the existence of pneumoconiosis by a preponderance of the evidence. App., *infra*, 5a-6a. *Mullins*, however, construed the regulations in 20 C.F.R. [illegible]. 727, which are worded quite differently from the regulations in Part 718 that are at issue in this case. Compare 20 C.F.R. 727.203(a) (claimant must "establis[h]" certain conditions; see 484 U.S. at 147) with 20 C.F.R. 718.202(a) (specifying evidence that "may form the basis for a finding of the existence of pneumoconiosis") and 20 C.F.R. 718.3(c) (providing that claimants shall be accorded the benefit of all reasonable doubt).

Moreover, the opinion in *Mullins* did not disapprove use of the "true doubt" rule. In holding that an ALJ was required to weigh all the evidence on both sides before a claimant could invoke the Department's "interim presumption" regulation, the Court explicitly noted the Secretary's use of the "true doubt" rule, observing that "[t]he Benefits Review Board (BRB) 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.' *Lessar* v. *C.F. & I. Steel Corp.*, 3 BLR 1-63, 1-68 (1981)." 484 U.S. at 144 n.12. See also *ibid.* ("[t]his position ensures that the employer will win, on invocation or rebuttal, only when its evidence is *stronger* than the claimant's"); *id.* at 156 n.29. The Court did not suggest any disapproval of the rule. The Court did state, in the last

footnote to its opinion, that it need not reach the issue of allocation of burdens of proof under the APA because "the regulation itself requires a claimant to prove an invocation fact by a preponderance of the evidence." *Id.* at 161 n.35. Given the opinion's prior references to the "true doubt" rule, however, and the fact that the rule's validity was not at issue, we think it clear that *Mullins* does not control the outcome of this case.[14] The Third Circuit's decision to the contrary conflicts directly with the decisions in *Skukan*, 993 F.2d at 1235, *Freeman United*, 988 F.2d at 711, and *Adkins* v. *Director, OWCP*, 958 F.2d 49, 52 & n.4 (4th Cir. 1992), all of which held that *Mullins* left the "true doubt" rule intact. See also *Grizzle* v. *Pickands Mather & Co.*, 994 F.2d 1093, 1098 n.7 (4th Cir. 1993) (noting conflict but not addressing issue); *id.* at 1100 (Hall, J., dissenting) (noting conflict and agreeing with Sixth and Seventh Circuits); App., *infra*, 6a & n.3 (acknowledging conflict).

b. The decisions below also create circuit conflicts through their holdings that use of the "true doubt" rule contravenes the Department's BLBA regulations, 20 C.F.R. 718.403, and Section 7(c) of the APA. The holding in *Greenwich Collieries* on the first issue conflicts directly with the Sixth Circuit's decision in *Skukan*, 993 F.2d at 1236-1239, which considered the issue in some detail and held that Section 718.403 does not preclude application of the "true doubt" rule. The holding in

[14] Another statement in the *Mullins* opinion has proven to be inaccurate in light of the Court's subsequent examination of the statutory scheme. Compare 484 U.S. at 154 (stating that interim presumption regulation "satisfie[d]" statutory requirement that it be no more restrictive than earlier regulations) with *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988) (holding the same regulation to be more restrictive).

Maher Terminals (and the effective holding in *Greenwich Collieries*) on the second issue conflicts not only with a proper reading of this Court's decisions in *Steadman* and *Transportation Management*, as discussed above, but also with the decisions in *Freeman United*, 988 F.2d at 710-711, and *Skukan*, 993 F.2d at 1236, both of which explicitly held that the "true doubt" rule is not inconsistent with Section 7(c).[15] See also 93-474 Pet. App. A15 (rejecting *Freeman*); *Grizzle*, 994 F.2d at 1098 n.7 (noting conflict); *Freeman United Coal Mining Co.* v. *OWCP*, 999 F.2d 291, 293 (7th Cir. 1993) (statement of Easterbrook, J., respecting suggestion for rehearing in banc) (acknowledging conflict and concluding that the court of appeals "should let the case proceed to the only tribunal that can supply the cure").

The decision in *Maher Terminals* is also inconsistent with decisions of other circuits upholding use of the "true doubt" rule under the LHWCA. See, *e.g.*, *Avondale Shipyards*, 914 F.2d at 91; *Brown* v. *I.T.T./Continental Baking Co.*, 921 F.2d 289, 295-296 (D.C. Cir. 1990); *Parsons Corp.*, 619 F.2d at 41; *F.H. McGraw & Co.*, 145 F.2d at 887-888. Although those courts did not expressly discuss Section 7(c) of the APA in the cases just cited, in other cases they have construed that provision to impose only a burden of production, not a burden of persuasion. See, *e.g.*, *Dazzio*, 970 F.2d at 77; *Merritt*, 960 F.2d at 18;

[15] *Maher Terminals* construed the LHWCA, while in *Skukan* and *Freeman* the "true doubt" issue arose under the BLBA. The rule operates in the same manner under both statutes, however, and the courts' differing views of the APA's requirements would surely have resulted in a different outcome had either the Sixth or Seventh Circuit decided either case below. Indeed, the court in *Maher Terminals* itself characterized its prior decision in *Greenwich Collieries* as having "held that the true doubt rule [is] inconsistent with the APA in cases involving the [BLBA]." 93-474 Pet. App. A7.

Alameda County Training & Employment Bd., 743 F.2d at 1269; *Hazardous Waste Treatment Council*, 886 F.2d at 366; *Environmental Defense Fund*, 548 F.2d at 1013-1015. The First Circuit, which has used the "true doubt" rule in reviewing agency action, see *Bath Iron Works Corp.* v. *White*, 584 F.2d 569, 574 (1978), has also held that Section 7(c) of the APA allocates only the burden of production. *Maine*, 669 F.2d at 829. It is therefore unlikely that any of the courts of appeals will reevaluate their approval of the "true doubt" rule based on the Third Circuit's analysis of Section 7(c).

c. The court of appeals' invalidation of the long-standing "true doubt" rule threatens to disrupt the Secretary's administration of the LHWCA and the BLBA. Administrative law judges receive an estimated 4000 new LHWCA cases and 3000 new black lung cases each year, and they have a backlog of approximately the same number of cases under each statute. The Benefits Review Board receives an estimated 3300 petitions for review of ALJ decisions in such cases every year, and has a backlog of approximately 4600 additional cases. Based on past experience, 24% of BLBA cases may be expected to arise in the Third Circuit. See Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1991*, at 22 (1992). The validity of the "true doubt" rule has been challenged in three circuits in the last year, and the Fourth Circuit, which avoided decision on the issue in *Grizzle*, has at least three pending cases in which the validity of the rule has been raised.[16] Moreover, the Third Circuit's interpretation of the APA presumably applies to all administrative adjudications subject to the requirements of that statute, and therefore calls into question the validity of any such proceeding in which the agency has allocated the risk of non-persuasion to a party other than the proponent of agency action.[17] The decisions below thus present significant and recurring issues on which the courts of appeals are in conflict, and warrant plenary review by this Court.

[16] See *Windsor Coal Co.* v. *McKay*, No. 93-1261 (4th Cir.); *Tilley* v. *Ranger Fuel Co.*, No. 93-1097 (4th Cir.); *Hale* v. *Island Creek Coal Co.*, No. 92-1851 (4th Cir.). See also *Malacusky* v. *Director, OWCP*, No. 92-BLA-1642, 1993 BLA LEXIS 1272 *6 (ALJ Aug. 6, 1993) (denying claim in case within the Third Circuit where x-ray evidence of pneumoconiosis was in equipoise).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

EDWIN S. KNEEDLER
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

EDWARD C. DUMONT
Assistant to the Solicitor General

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor

NOVEMBER 1993

[17] See *Old Ben Coal Corp.*, 523 F.2d at 39-40 (opinion on denial of petition for rehearing) (burden of persuasion on mine operator contesting imminent danger withdrawal order under Federal Coal Mine Health & Safety Act of 1969); *Hazardous Waste Treatment Council*, 886 F.2d at 366-368 (burden of persuasion on generator of hazardous waste under environmental statute).

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 92-3270

GREENWICH COLLIERIES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, AND
ANDREW ONDECKO, RESPONDENTS

Argued Jan. 12, 1993.
Decided March 23, 1993.

Before HUTCHINSON, SCIRICA, and ROSENN, Circuit Judges.

OPINION FOR THE COURT

ROSENN, Circuit Judge:

This petition for review of a decision of the Director, Office of Workers' Compensation Programs, presents a novel question in this circuit relating to the claimant's burden of proof in a black lung benefit case. Andrew Ondecko, the claimant, filed an application for benefits with the United States Department of Labor pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901-45 (1982) (the Act). Ondecko claimed total disability due to pneumoconiosis contracted through

coal mine exposure, and further, that this condition precluded him from performing his regular or comparable work.

The employer, Greenwich Collieries, strongly contested the claim. The Administrative Law Judge (ALJ) found that the copious conflicting medical evidence created a "true doubt" as to the presence of pneumoconiosis, and she utilized the true doubt rule to resolve that doubt in favor of the claimant. The ALJ then found a causal relationship between Ondecko's condition and his tenure in mine employment on the basis of the presumption triggered by the ALJ's finding of pneumoconiosis and Ondecko's 31 years of service in coal mines. *See* 20 C.F.R. § 718.203 (1992). Finally, the ALJ concluded, despite the testimony of a pulmonary specialist that Ondecko was not disabled, that there was a true doubt as to whether Ondecko was totally disabled, and she again resolved this doubt in favor of the claimant.

Greenwich appealed the ALJ's Decision to the Benefits Review Board (the Board), arguing, *inter alia*, that the Administrative Procedure Act (the APA), 5 U.S.C. sections 551-559, 701-06 (1988), requires that a claimant prove the existence of pneumoconiosis and total disability by a preponderance of the evidence, thus precluding use of the true doubt rule in cases under the Act. The Board affirmed the ALJ's decision, and Greenwich thereafter timely appealed to this court.[1] We vacate the Board's decision and remand.

---

[1] This court exercises jurisdiction over a final order of the Board pursuant to section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c) (1982), as incorporated by section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1982).

I. THE FACTS

Ondecko worked for approximately 31 years in coal mine employment. He was most recently employed by Greenwich Collieries as a pipe man in a coal mine where he worked underground fixing and replacing pipe for five to six years.

After considering Ondecko's application for benefits, the Department issued a Preliminary Determination of Non-entitlement, finding that he did not suffer from a disease or disability. Pursuant to Ondecko's request, the ALJ held a hearing, and she subsequently issued a Decision and Order awarding benefits to the claimant.

In reaching her decision, the ALJ found that the copious conflicting medical evidence and testimony created a true doubt as to whether Ondecko suffered from pneumoconiosis and whether that condition rendered him totally disabled. In other words, the evidence as to these ultimate facts was equally probative and therefore in equipoise. She thereupon awarded Ondecko benefits by resorting to the true doubt rule, i.e., she resolved the doubt over the presence or absence of pneumoconiosis and disability in favor of the claimant. Thus, it is unclear whether the ALJ ever considered whether the claimant had proved his entitlement to benefits by a preponderance of the evidence.

II. DISCUSSION

Our review of the propriety of the ALJ's use of the true doubt rule, a question of legal interpretation, is plenary. *See, e.g., Carozza v. United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984).

> Disability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment.

> All three of these conditions of eligibility are presumed if the claimant was engaged in coal mine employment for at least 10 years and if the claimant meets one of the four medical requirements: (1) a chest X ray establishes the presence of pneumoconiosis . . .

Mullins Coal Co. v. Director, OWCP, U.S. Dep't of Labor, 484 U.S. 135, 141, 108 S.Ct. 427, 431, 98 L.Ed.2d 450 (1987) (footnote omitted); *see also* 20 C.F.R. §§ 718.303-05 (1992).

The ALJ utilized the true doubt rule to find that Ondecko does in fact suffer from pneumoconiosis and is totally disabled. The true doubt rule is a tool adopted by several courts to evaluate the evidence on the record as a whole:

> "[T]he factfinder operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee because the intent of the statute is to place the burden of possible error on those best able to bear it." *Noble Drilling Co. v. Drake,* 795 F.2d 478, 481 (5th Cir. 1986). In effect, the statute eases the ordinary preponderance of the evidence standard applicable in most civil suits. *Id.*

Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 90-91 (5th Cir. 1990); *see also Fidelity & Casualty Co. v. Burris,* 59 F.2d 1042, 1044 (D.C.Cir. 1932) ("Where there is doubt, it should be resolved in favor of the injured employee or his dependent family."); *Parsons Corp. of Cal. v. Director, OWCP, U.S. Dep't of Labor,* 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White,* 584 F.2d 569 (1st Cir. 1978).[2]

[2] Most of the cases cited above regarding the evolution of the true doubt rule involve the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-50 (1982), rather than the Black Lung Benefits Act. *See supra* note 1.

The premise underlying the true doubt rule, originally put forth in *Burris,* is that compensatory statutes such as the Act should provide indemnity in cases of faultless injury at the worksite and therefore should be interpreted liberally in favor of the claimant. *Burris,* 59 F.2d at 1044. "Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty by society to an injured employee to secure his protection." *Id.*

Thus, the true doubt rule has become a shorthand and convenient method utilized by some courts and administrative agencies to allocate the ultimate burden of persuasion, i.e., the risk of non-persuasion, to the employer because it is the party best able to bear that risk.

Greenwich Collieries vigorously maintains that an ALJ may not resolve evidentiary conflicts in a claimant's favor when the evidence for and against entitlement under the Black Lung Benefits Act is found to be equally probative.

A. *The ALJ's use of the true doubt rule to find pneumoconiosis was improper according to Supreme Court precedent.*

Pursuant to regulations under the Act, there are four bases for determining the existence of pneumoconiosis in a living claimant. 20 C.F.R. § 718.202. The first basis, which is the one utilized by the ALJ in the case *sub judice,* requires a claimant to produce a qualifying X ray which establishes the presence of pneumoconiosis. 20 C.F.R. §§ 718.202(a)(1), 718.102.

The Supreme Court has decided that the X ray produced by the claimant may not merely "constitute evidence" of pneumoconiosis, but must show the presence of pneumoconiosis by a preponderance of the evidence.

Mullins, 484 U.S. at 138, 147-52, 108 S.Ct. at 429, 433-37; *Freeman United Coal Mining Co. v. OWCP*, 1993 WL 56178, 988 F.2d 706, 709 (7th Cir. 1993).[3]

Therefore, in this case, *Mullins* mandates that Ondecko's X ray must prove the existence of pneumoconiosis by a preponderance of the evidence. However, medical experts disagreed as to whether Ondecko's X ray established the presence of pneumoconiosis. The ALJ could not resolve this disagreement and found that there was true doubt as to whether Ondecko actually suffered from the ailment. Therefore, the ALJ did not find that Ondecko's X ray proved the existence of pneumoconiosis by a preponderance of the evidence; rather, she merely found the X ray and the accompanying medical readings created evidentiary equipoise as to the existence of pneumoconiosis. She then applied the true doubt rule to find in favor of Ondecko.

As discussed more thoroughly *infra*, a preponderance of the evidence is defined as:

> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black's Law Dictionary 1182 (6th ed. 1990). The ALJ in this case found in favor of Ondecko, despite the fact that it was no more likely than not that he suffered from pneumoconiosis, in contravention of *Mullins*.

---

[3] The *Freeman* court went on to uphold the ALJ's use of the true doubt rule in that case. As discussed in detail, *infra*, we believe that this conclusion cannot follow. If a claimant must produce an X ray which proves the presence of pneumoconiosis by a preponderance of the evidence, then use of the true doubt rule is improper because it allows the claimant to prevail despite having failed to meet this burden.

B. *The true doubt rule generally contravenes the regulations under the Act and the APA.*

As discussed, *Mullins* precludes the ALJ's use of the true doubt rule to find the ultimate fact of the presence of pneumoconiosis pursuant to 20 C.F.R. section 718.202(a)(1). Further, if the presence of pneumoconiosis is not proved by a preponderance of the evidence, the presumption of causality upon which the ALJ relied in this case is improper, regardless of the length of the claimant's coal mine employment. These conclusions are sufficient to dispose of the present case. However, this section is necessary to show why the ALJ's use of the true doubt rule to find total disability was improper and also generally to explain why the use of the true doubt rule is not allowed in any case under the Act, whether or not a presumption is involved.

1. *The claimant bears the ultimate burden of persuasion.*

Traditionally, under our system of jurisprudence, both in the criminal and civil law, the ultimate burden of persuasion is placed on the accuser or claimant. *See generally* Vaughn C. Ball et al., *McCormick's Handbook on the Law of Evidence* § 337 (Edward W. Cleary ed., 2d ed. 1972). In criminal cases, those accused of crimes are presumed to be innocent unless proven guilty beyond a reasonable doubt. In civil cases when a party bears the burden of persuading the factfinder that the existence of a fact is more likely than not, if the factfinder cannot resolve the doubt regarding the existence of that fact, it must find in favor of the party who does not bear the burden of persuasion. It cannot be gainsaid that "[h]eed must be given to the burden of proof, at least when other tests are lacking." *Shapleigh v. Mier*, 299 U.S. 468, 475,

57 S.Ct. 261, 264, 81 L.Ed. 355 (1937) (Cardozo, J.). This fundamental principle is embodied in the Act, its regulations, and in Supreme Court precedent.

Black lung disability claims filed after March 31, 1980, are evaluated under the criteria established by section 718 of the permanent black lung regulations. *See Mullins,* 484 U.S. at 139, 108 S.Ct. at 429-30; *Director, OWCP, U.S. Dep't of Labor v. Mangifest,* 826 F.2d 1318, 1320-21 (3d Cir. 1987). Section 718 states in pertinent part:

> The burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegations.

20 C.F.R. § 718.403 (1992).

The employer in this case contends that this language allocates the ultimate burden of persuasion to the claimant. *See Mangifest,* 826 F.2d at 1320 (miner must prove pneumoconiosis and total disability); *accord Robinson v. Pickands Mather & Co./Leslie Coal Co.,* 914 F.2d 35, 36 (4th Cir. 1990); *Lollar v. Alabama By-Products Corp.,* 893 F.2d 1258, 1262 (11th Cir. 1990). The claimant argues, however, that section 718 merely allocates the burden of coming forward with evidence to the claimant, and that the ultimate burden of persuasion rests with the employer. Therefore, contends Ondecko, the claimant sustains his burden upon establishing a *prima facie* case of his claims; it is the employer who must then prove non-entitlement by a preponderance of the evidence.

To bolster this argument, Ondecko points to the Supreme Court's decision in *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). In that case, the Supreme Court

stated that APA section 7(c)'s statement that the claimant bears the burden of proof "determines only the burden of going forward, not the burden of persuasion." *Transportation Management,* 462 U.S. at 403-04 n. 7, 103 S.Ct. at 2475-76 n. 7.

Ondecko's reliance on *Transportation Management,* however, is misplaced. Unfortunately, the etymology of the phrase "burden of proof" is such that the phrase can be used to mean solely the burden of persuasion, solely the burden of production, or both. *See, e.g., Northwestern Elec. Co. v. Federal Power Comm'n,* 134 F.2d 740, 743 (9th Cir. 1943); *Ambrose v. Wheatley,* 321 F.Supp. 1220, 1222 (D.Del. 1971); Vaughn C. Ball et al., *McCormick's Handbook on the Law of Evidence* § 336 (Edward W. Cleary ed., 2d ed. 1972). As recognized over 150 years ago, "[o]ne-half of the doubts in life arise from the defects of language," *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 232, 6 L.Ed. 23 (1824). Courts often must clarify the frequent confusion arising from the triad of meanings which can be ascribed to the phrase "burden of proof," as evinced by the Supreme Court's pronouncement pertaining to section 7(c) of the APA in *Transportation Management.*

However, the verb "prove," as used in section 718, is not subject to the same ambiguity as the phrase "burden of proof," as used in section 7(c) of the APA. When one must *prove* a given fact or issue, that person carries the *burden of persuasion* on that issue. "We think 'to prove her case' meant to prove the material allegation of her complaint, or each and every allegation in her complaint necessary to recover a judgment." *Taggert v. Scott,* 193 Ark. 930, 104 S.W.2d 816, 818 (1937). "To prove" means "to establish or make certain; to establish a fact or hypothesis as true by satisfactory and sufficient evi-

dence." *Lawson v. Superior Court,* 155 Cal.App.2d 755, 318 P.2d 812, 814 (1957); *accord Texas & New Orleans R.R. Co. v. Flowers,* 336 S.W.2d 907, 913-14 (1960); *Black's Law Dictionary* 1224 (6th ed. 1990).

The burden of persuasion is similarly defined as "the necessity of establishing a fact," in contrast to the burden of production, which is defined as "the necessity of making a *prima facie* showing." *Chesapeake & Potomac Tel. Co. v. Hicks,* 25 Md.App. 503, 337 A.2d 744, 756 (1975). Therefore the burden of production requires a party to *produce* evidence regarding a fact; the burden of persuasion requires a party to *prove* a fact. *See Hicks v. Feiock,* 485 U.S. 624, 637, 108 S.Ct. 1423, 1432, 99 L.Ed.2d 721 (1988) (emphasis supplied) (Supreme Court stated that a statute which required a criminal defendant to carry the *burden of persuasion* would be unconstitutional because it would "undercut the State's burden to *prove* guilt beyond a reasonable doubt."); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 257-58, 101 S.Ct. 1089, 1095-96, 67 L.Ed.2d 207 (1981) (Burden of production requires party to articulate a reason for his actions while *burden of persuasion* requires a party to *prove* such reasons); *United States v. Liotard,* 817 F.2d 1074, 1077 (3d Cir. 1987), cited with approval in *United States* v. *Garcia,* 919 F.2d 881, 886 (3d Cir. 1990) (Government bears the *burden of persuasion* and therefore must *prove* its case by a preponderance of the evidence).

It is therefore of moment that section 718.403 does not contain the phrase "burden of proof." Rather, as stated above, that section states that "the burden of *proving* a fact alleged" rests with the claimant. 20 C.F.R. § 718.403 (1992) (emphasis supplied). Hence, although the meaning of the phrase "burden of proof" is subject to question, when a regulation provides that the claimant must *prove* the facts he alleges, and one of the facts he alleges

is the existence of pneumoconiosis, the claimant then bears the ultimate burden of persuasion regarding that fact. *See e.g., Mangifest* at 1320 (emphasis supplied) ("Under Part 718, the miner must *prove* that he has pneumoconiosis . . . and that he is totally disabled."). Thus, section 718 requires that the claimant prove pneumoconiosis, which means that he must establish the existence in fact of pneumoconiosis and therefore bears the burden of persuasion on that issue.[4]

We do not discount the humanitarian purposes of the Act. The legislature accomplished a significant objective in this regard, however, when it gave the claimant who meets certain criteria the benefit of a triple presumption of 1) the existence of pneumoconiosis, 2) that the pneumoconiosis resulted from coal mine employment, and 3) that the pneumoconiosis caused total disability. "But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that the miner is entitled to benefits." *Mullins,* 484 U.S. at 158, 108 S.Ct. 439-40.

Although we recognize that the Act should be construed liberally, that does not empower us to rewrite the provisions of the Act and its regulations requiring the claimant to prove the material allegations of his complaint. The reasoning of the court in *Pillsbury v. United Engineering Co.* is equally applicable to the case *sub judice*:

> We are aware that [the statute] is a humanitarian Act, and that it should be construed liberally to effectuate its purposes; but that does not give us the

[4] Because the Act's regulations place the burden of persuasion upon the claimant, we need not address the issue of whether section 7(c) of the APA, 5 U.S.C. section 556(d), similarly allocates that burden to the claimant.

> power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all.

342 U.S. 197, 200, 72 S.Ct. 223, 225, 96 L.Ed. 225 (1951).

2. *The APA and the Supreme Court have defined the burden of persuasion as preponderance of the evidence.*

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates Section 19(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d), which in turn requires that any hearing under the Longshoremen's Act be conducted in accordance with the provisions of 5 U.S.C. section 554 of the APA. 20 C.F.R. § 725.452(a) (1992). This Court has acknowledged:

> The requirements of the Administrative Procedure Act (APA) are made applicable to the department of Labor Black Lung Adjudications by the Longshoremen's and Harbor Worker's Compensation Act. 33 U.S.C. § 919(d) (1982) as incorporated by 30 U.S.C. § 932(a) (1982).

North Am. Coal Co. v. Miller, 870 F.2d 948, 951 (3d Cir. 1989).

Section 7(c) of the APA provides in pertinent part:

> Except as other provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

In 1981, the Supreme Court stated that "[t]he language of [section 7(c) of the APA] itself implies the enactment of a standard of proof, and that standard of proof is the preponderance of the evidence standard." *Steadman v. SEC,* 450 U.S. 91, 98, 102, 101 S.Ct. 999, 1006, 1008, 67 L.Ed.2d 69 (1981). Therefore, unless superseded by an express statutory provision,[5] the APA requires that the party who bears the ultimate burden of persuasion prove his case by a preponderance of the evidence.

3. *The true doubt rule impermissibly allows a claimant to prevail despite having failed to sustain his burden of persuasion by a preponderance of the evidence.*

A preponderance of the evidence is defined as:

> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black's Law Dictionary 1182 (6th ed. 1990). Moreover, this court has recognized:

> [The fact-finder] must at least be convinced that the evidence considered as a whole, its "preponderance" to use the traditional term, indicates that the facts

[5] Section 12 of the APA, 5 U.S.C. § 559, allows for its authority to be superseded by express provisions in statutes. However, Greenwich is correct in stating that none of the following amount to an express statutory provision having the authority to supersede the APA on the issue of the degree of evidence which will satisfy the burden of persuasion: the legislative history to the Act, which clearly enunciates its humanitarian and remedial purpose, longstanding use of the true doubt rule by the Board, judicial acceptance of the true doubt rule, or Congressional acquiescence.

> asserted by the plaintiff are probably true. . . . *[I]f in their minds the probabilities of those facts being true or false appear equal the plaintiff has not met his burden of proof and a finding for the plaintiff would be inconsistent with the [fact finder's] duty to render a true verdict.*

Burch v. Reading Co., 240 F.2d 574, 579 (3d Cir. 1957) (emphasis added), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *accord Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1124 (3d Cir. 1992). Thus, a party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not.

The true doubt rule, in contrast, is applicable only when the evidence on both sides of the issue is "equally probative."[6] Allowing a claimant, who bears the ultimate burden of persuasion, to prevail when the evidence is in equipoise is tantamount to allowing that claimant to prevail despite having failed to carry his burden by a preponderance of the evidence. As the Fifth Circuit has aptly and, for purposes of this case fatally, observed, "In effect, the [true doubt rule] eases the ordinary preponderance of the evidence standard applicable in most civil suits." *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88 (5th Cir. 1990).

However, as discussed above, the APA does not allow such an alleviation of the claimant's burden of persuasion. Hence, the use of the true doubt rule in cases under

[6] In *Provance v. United States Steel Corp.*, the Board determined that the claimant was not eligible to have the true doubt rule applied to his case because his evidence was not "equally probative" to that offered in opposition to his claim. *Provance v. United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 486 (1978).

the Act contravenes the APA as interpreted by the Supreme Court of the United States.

Therefore, Ondecko was required to prove by a preponderance of the evidence that he was entitled to benefits under the Act. The ALJ found that the evidence was in equipoise on the issues of pneumoconiosis and total disability, which, by definition, means that Ondecko did not carry his burden of proof by a preponderance of the evidence on these issues. The finding in his favor therefore was erroneous.

III. CONCLUSION

In sum, we hold that the use of the true doubt rule in the case *sub judice* contravenes *Mullins* because, in order to make use of the presumption involved in this case, a claimant's X ray must prove pneumoconiosis by a preponderance of the evidence. Moreover, the true doubt rule is contrary to Supreme Court precedent, the regulations under the Act, and the APA because (1) the claimant bears the ultimate burden of persuasion on the ultimate facts entitling him to benefits under the Act; (2) the APA and the Supreme Court have defined the ultimate burden of persuasion as a preponderance of the evidence; and (3) the true doubt rule would allow a claimant to prevail despite failing to prove entitlement by a preponderance of the evidence. Because there is no express provision in the Act which overrides the APA, the claimant must prove the existence of pneumoconiosis and total disability by a preponderance of the evidence.

It is not clear, however, whether the ALJ ever considered whether the claimant's evidence satisfied the preponderance standard. It appears that upon reaching what she believed to be the point of equipoise, and believing the true doubt rule to be applicable, the ALJ

may have halted her inquiry short of deciding whether Ondecko's evidence preponderated. We will therefore vacate the ALJ's Order and remand for further proceedings to allow the ALJ to make this determination. If the ALJ again concludes that the evidence is in equipoise, then Greenwich must prevail.

Accordingly, the decision and order of the Benefits Review Board will be vacated and the case remanded for further proceedings consistent with this opinion.

APPENDIX B

DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
800 K Street N.W.
Washington, D.C. 20001-8002

[SEAL]

BRB No. 90-2081 BLA
OWCP No. 198-20-7288

ANDREW ONDECKO, CLAIMANT-RESPONDENT

v.

GREENWICH COLLIERIES, EMPLOYER-PETITIONER

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PARTY-IN-INTEREST

Date Issued: March 18, 1992

DECISION and ORDER

Appeal of the Decision and Order of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and LIPSON, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Habor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

PER CURIAM:

Employer appeals the Decision and Order (89-BLA-2019) of Administrative Law Judge Joan Huddy Rosenzweig, awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that the parties stipulated to thirty-one years of qualifying coal mine employment, Decision and Order at 3; *see* Hearing Transcript at 6, and, applying the regulations at 20 C.F.R. Pt. 718, found that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), Decision and Order at 14, that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), Decision and Order at 15, and that claimant is totally disabled by pneumoconiosis, Decision and Order at 17. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(1), and in failing to weigh the evidence under 20 C.F.R. § 718.204(c). Claimant[1] responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, did not file a brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence,

[1] Claimant is Andrew Ondecko, the miner, who filed his claim for benefits on January 31, 1989. Decision and Order at 3; Director's Exhibit 1.

[2] Inasmuch as no challenge is made to the administrative law judge's findings regarding the length of coal mine employment and Sections 718.203(b) and 718.204(c)(2), (3), they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge misapplied the true-doubt rule[3] pursuant to Section 718.202(a)(1), in that she credited the only physician who interpreted x-rays as positive for the existence of pneumoconiosis while disregarding the more numerous negative interpretations of both employer's and the Director's physicians, Employers' Brief at 4. Employer further argues that the administrative law judge's true-doubt analysis is insufficient under the Administrative Procedure Act (APA), because it relieves claimant of his burden of proof. Employer's Brief at 5-6.

An administrative law judge is not required to accept as conclusive the numerical superiority of x-ray interpretations. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Additionally, inasmuch as negative readings are not a trustworthy indicator of the absence of pneumoconiosis, *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), the administrative law judge properly credited the positive readings, *see Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-

[3] The true-doubt rule is an evidentiary rule applicable to the administrative law judge's conclusion concerning the weight of the evidence. "True doubt" is said to arise only when equally probative but contradictory evidence is presented in the record, where selection of one set of facts would resolve the case against claimant, but selection of the contrary set of facts would resolve the case for claimant. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

666 (1983), and determined that "at least one Board-certified radiologist and B-reader[4] repeatedly found evidence of pneumoconiosis significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations." Decision and Order at 14. Thus, since the administrative law judge found the positive and negative interpretations by physicians who were board-certified/B-readers to be equally probative, true doubt existed which must be resolved in favor of claimant. Decision and Order at 8; *see Wilt, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Moreover, we hold that the administrative law judge's findings pursuant to Section 718.202(a)(1) are in compliance with the Administrative Procedure Act inasmuch as she properly discussed and weighed all relevant medical evidence. *See* 5 U.S.C. § 557(c)(3)(A), as incorporated into the Act by 5 U.S.C. § 554(c)(2), 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Therefore, we affirm the administrative law judge's finding that pneumoconiosis has been established pursuant to Section 718.202(a)(1).

Pursuant to Section 718.204(c), employer argues that the administrative law judge erred in crediting Dr. Dandrea because his report is not reasoned, and in applying the true-doubt rule to the medical opinion

[4] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

evidence because claimant must establish total respiratory disability by a preponderance of the evidence. Employer's Brief at 7. In finding claimant totally disabled by pneumoconiosis, the administrative law judge noted that of the eight physicians of record, the reports of Drs. Ignacio, Dandrea, Sabo, and Malhotra "support the conclusion that claimant is disabled by pneumoconiosis," while those of Drs. Pickerill, Begley, Strother, and Fino concluded that claimant did not have pneumoconiosis and was not totally disabled from a pulmonary standpoint. While recognizing that the latter four physicians are "highly qualified Board-certified pulmonary specialists," the administrative law judge gave "special consideration" to Dr. Dandrea, who has been claimant's treating physician for more than twenty years. Decision and Order at 16; *Ondecko v. Director, OWCP*, 14 BLR 1-2 (1989). Noting that "it remained Dr. Dandrea's opinion based on his observation of the Claimant over the years that the Claimant is totally disabled by coal workers' pneumoconiosis and chronic obstructive pulmonary disease," the administrative law judge found "the fact that the Claimant's treating physician considers him totally disabled to raise true doubt in face of the Employer's experts[']' opinions." Decision and Order at 16-17. Resolving her finding of true doubt in favor of claimant, the administrative law judge concluded that "Claimant has proved that he is totally disabled by pneumoconiosis." *Id.; Wilt, supra; Clark, supra; Kozele, supra.*

To establish that claimant is totally disabled due to pneumoconiosis the administrative law judge must discuss all of the evidence of record and, if she determines that the record contains contrary probative evidence, she must the assign such evidence appropriate weight

and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). The existence of contrary probative evidence in the record does not preclude evidence supportive of a claim from being sufficient to establish total disability since all relevant evidence must be weighed. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986).

Here, while the administrative law judge failed to make specific findings pursuant to Sections 718.204(b), (c), she stated her basis for finding the evidence equally probative, Decision and Order at 12-13, and her discussion of the medical evidence of record supports the inference that she considered the contrary probative evidence and found it outweighed by Dr. Dandrea's opinion as corroborated by those of Drs. Ignacio, Sabo, and Malhotra. *See* Decision and Order at 7-13; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1984); *Fuller v. Gilbralter Coal Corp.*, 6 BLR 1-1291 (1984). Inasmuch as the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we hold that the administrative law judge properly considered the contrary probative evidence, *see Rafferty, supra; Shedlock, supra; see also Kuchwara, supra; Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983), and affirm her conclusion that

claimant has established total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c),[5] *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc*).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Sheldon R. Lipson
SHELDON R. LIPSON
Administrative Law Judge

[5] The presumption contained in Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4), as implemented by Section 718.305, is not applicable as this claim was filed after January 1, 1982. *See* Director's Exhibit 1; 20 C.F.R. § 718.305(e).

APPENDIX C

U.S. DEPARTMENT OF LABOR [SEAL]
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

CASE NO. 89- BLA-2019
OWCP NO. 198-20-7288

IN THE MATTER OF
ANDREW ONDECKO, CLAIMANT

v.

GREENWICH COLLIERIES AND PENNSYLVANIA LIGHT AND POWER, EMPLOYER

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,[1] PARTY-IN-INTEREST

Date Issued: August 3, 1990

APPEARANCES:

Robert J. Bilonick, Esq. for the Claimant

Thomas A. Aurandt, Esq. for the Employer

Before: Joan Huddy Rosenzweig, Administrative Law Judge

---

[1] No appearance was entered on behalf of the Director, Office of Workers' Compensation Programs (Tr. 5).

DECISION AND ORDER—AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. Section 901 *et seq.*

On August 16, 1989, the Director, Office of Workers' Compensation Programs, referred this case to the Office of Administrative Law Judges for a formal hearing (Dir. Ex. 46).[2] I held a hearing in this matter on March 5, 1990 in Pittsburgh, Pennsylvania.[3] All parties were afforded full opportunity to present evidence and to examine and cross-examine witnesses as provided in the Act and applicable regulations.[4]

---

[2] "Dir. Ex." refers to the Director's exhibits; "Er. Ex." refers to the Employer's exhibits; "Cl. Ex." refers to the Claimant's exhibits; "ALJ Ex." refers to the Administrative Law Judge exhibits; and "Tr." refers to the official transcript of this proceeding.

[3] The record was held open until May 1, 1990 to allow both parties to submit x-ray rereadings (Tr. 8-10; 28-29). By letter dated April 4, 1990 the Claimant submitted: (1) Dr. K. N. Mathur's March 19, 1990 interpretation of the Claimant's January 12, 1990 chest x-ray and Dr. Mathur's curriculum vitae; and (2) Dr. K. N. Mathur's March 26, 1990 interpretation of the Claimant's January 31, 1990 chest x-ray and again Dr. Mathur's curriculum vitae. These documents are identified as Claimant's Exhibits 6 and 7 respectively and are received into evidence. By letter dated April 20, 1990 the Employer submitted: (1) Dr. Patrick W. Wolfe's March 13, 1990 interpretation of the Claimant's January 31, 1990 chest x-ray; (2) Dr. William E. Palmer's March 14, 1990 interpretation of the Claimant's January 12, 1990 and January 31, 1990 chest x-rays; and (3) Dr. Fino's March 16, 1990 interpretation of the Claimant's January 12, 1990 chest x-ray. These documents are identified as Employer's Exhibits 22-24 respectively and are received into evidence. The Employer submitted a closing statement May 7, 1990 (see Tr. 32); it is considered the Claimant was also given the opportunity to respond to the Employer's closing remarks (Tr. 32); no response was received.

[4] *See* Title 20 of the Code of Federal Regulations. Regulation section numbers cited in this Decision and Order refer to sections of that title.

The issues before me are:

1. Whether the Claimant worked at least 30-1/2 years in or around one or more coal mines;

2. Whether the Claimant has pneumoconiosis as defined in the Act and regulations;

3. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether the Claimant is totally disabled; and

5. Whether the Claimant's disability is due to pneumoconiosis (Dir. Ex. 46; Tr. 6).[5]

Based on witness testimony and on a thorough analysis of the entire record with due consideration accorded to the parties' arguments, applicable statutory provisions, regulations, and relevant case law, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Claimant was born March 31, 1927 (Dir. Ex. 1; Tr. 10). The parties present at the hearing stipulated that the Claimant has 31 years of qualifying coal mine employment (Tr. 6); this is supported by the record (Dir. Ex. 2, 4-14). The Claimant ceased working in the mines January 4, 1989 (Tr. 11). He filed for Black Lung Benefits January 31, 1989 (Dir. Ex. 1). His wife Rose, whom he married in 1952, is his only dependent (Dir. Ex. 1, 15, Tr. 10-11).

[5] Issues 1 through 5 were contested by the Director (Dir. Ex. 46). Issues 2 through 5 were contested by the Employer (Dir. Ex. 46). The Employer also raised the "other issue": "Claimant is not a working miner, although he reserves Sickness and Accident Benefits which began on January 11, 1989[.]" *See* Dir. Ex. 46.

Medical Evidence

X-ray Evidence

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Dir. Ex. 26	10-12-76	10-12-76	Hurst
Impression: pneumoconiosis			
Er. Ex. 1	10-12-76	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	10-12-76	9-21-89	Palmer, BCR, B
Impression: completely negative			
Dir. Ex. 27	2-24-81	2-25-81	Rice, BCR
Impression: pneumoconiosis			
Er. Ex. 1	2-24-81	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	2-24-81	9-21-89	Palmer, BCR, B
Impression: completely negative			
Dir. Ex. 28	12-29-81	12-29-81	Rice, BCR
Impression: mild fibrosis			
Er. Ex. 1	12-29-81	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	12-29-81	9-21-89	Palmer, BCR, B
Impression: completely negative			
Er. Ex. 1	12-29-82	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	12-29-82	9-21-89	Palmer, BCR, B
Impression: completely negative			

[6] The following abbreviations designate the physicians' radiological qualifications:

BCR—Board-certified Radiologist
A—A-reader
B—B-reader
— —Indicates fact is unknown

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Er. Ex. 7	3-27-83	10-20-89	Palmer, BCR, B
Impression: no parenchymal abnormalities consistent with pneumoconiosis noted; but pleural abnormalities consistent with pneumoconiosis are noted			
Er. Ex. 8	3-27-83	10-17-89	Wolfe, BCR, B
Impression: 0/0			
Dir. Ex. 29	2-12-86	2-13-86	Rice, BCR
Impression: mild fibrosis			
Er. Ex. 1	2-12-86	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	2-12-86	9-21-89	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Dir. Ex. 30	12-28-88	12-29-88	Rice, BCR
Impression: minimal fibrotic changes			
Er. Ex. 1	12-28-88	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	12-28-89	9-4-89	Palmer, BCR, B
Impression: completely negative			
Er. Ex. 7	2-20-89	10-20-89	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Er. Ex. 8	2-20-89	10-17-89	Wolfe, BCR, B
Impression: 0/0			
Cl. Ex. 2	2-20-89	9-21-89	Mathur, BCR, B
Impression: 1/1 p s			
Dir. Ex. 25	2-21-89	2-22-89	Rice, BCR
31 Impression: 0/1 q q			
Dir. Ex. 24	2-21-89	4-3-89	Sargent, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Er. Ex. 9	2-21-89	11-7-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 10	2-21-89	11-14-89	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Dir. Ex. 43	4-17-89	4-17-89	Pickerill, B
Impression: 0/0			
Dir. Ex. 43	4-17-89	4-19-89	Patterson, BCR, B
Impression: 0/0			
Cl. Ex. 5	4-17-89	2-9-90	Mathur, BCR, B
Impression: 2/1 s t			
Er. Ex. 6	9-28-89	9-28-89	Begley, —
Impression: no pneumoconiosis			
Er. Ex. 7	9-28-89	10-20-89	Palmer, BCR, B
Impression: no parenchymal abnormalities consistent with pneumoconiosis; but pleural abnormalities consistent with pneumoconiosis are noted			
Er. Ex. 8	9-28-89	10-17-89	Wolfe, BCR, B
Impression: 0/0			
Cl. Ex. 4	10-23-89	10-24-89	Rice, BCR
Impression: 0/1 q q			
Er. Ex. 16	10-23-89	1-25-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 17	10-23-89	2-5-90	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Cl. Ex. 3	10-23-89	1-6-90	Mathur, BCR, B
3 Impression: 1/1 p s			
Er. Ex. 14	1-12-90	1-12-90	Wolfe, BCR, B
Impression: 0/0			

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Er. Ex. 23	1-12-90	3-14-90	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Er. Ex. 24	1-12-90	3-16-90	Fino, B
Impression: completely negative			
Cl. Ex. 6	1-12-90	3-19-90	Mathur, BCR, B
Impression: 1/2 p s			
Er. Ex. 18	1-31-90	1-31-90	Fino, B
Impression: 0/0			
Er. Ex. 22	1-31-90	3-13-90	Wolfe, BCR, B
Impression: 0/0 for small opacities (no parenchymal abnormalities consistent with pneumoconiosis; plural abnormalities consistent with pneumoconiosis are noted)			
Er. Ex. 23	1-31-90	3-14-90	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Cl. Ex. 7	1-31-90	3-26-90	Mathur, BCR, B
Impression: 1/1 t s			

Pulmonary Function Study Evidence

Ex. No.	Date	Physician	Age	Hgt	FEV1	MVV	FVC	FEV1 FVC	Cooperation & Understanding
Dir. Ex. 17	12-29-81	Krumholz	54	66"	2.51	60	3.51	72%	—
Interpretation: mild obstructive pulmonary disease, *see* reviews of Board-certified pulmonary specialists Drs. Fine [*sic*], Solic and Pickerill (Er. Ex. 3-5)									
Dir. Ex. 18	4-1-82	Krumholz	55	66"	2.60	85	3.62	72%	—
Interpretation: mild to moderate obstructive pulmonary disease consistent with emphysema and bronchitis[;] *see* also reviews of Drs. Fino, Solic, and Pickerill (Er. Ex. 3-5)									
Dir. Ex. 19	12-28-88	Ignacio	61	66"	2.62	—	3.83	68%	good
					2.77	—	4.02	69%	
Interpretation: no restrictive/obstructive disease; severe small airways disease, *see* also reviews at Er. Ex. 3-5									
Dir. Ex. 20	2-21-89	Ignacio	61	66"	2.69	75.89	3.42	79%	good
Interpretation: normal spirometry; no restrictive/obstructive defect									
Dir. Ex. 43	4-17-89	Pickerill	62	64"	2.51	97.81	3.58	70%	fair
					2.75	104.60	3.78	73%	
Interpretation: mild obstructive impairment; no restriction; normal MVV									

Ex. No.	Date	Physician	Age	Hgt	FEV1	MVV	FVC	FEV1 FVC	Cooperation & Understanding
Er. Ex. 6	9-28-89	Begley	62	65"	2.25	80.2	2.84	79%	good
					2.48	93.9	3.49	71%	
Interpretation: obstructive disease of the small airways									
Cl. Ex. 4	11-2-89	Malhotra	62	64"	2.50	112	3.60	69%	
Interpretation: moderate small airway disease, *see* reviews by Board-certified pulmonary specialists Drs. Pickerill, Solic, Fino (Er. Ex. 11-13)									
Er. Ex. 15	1-12-90	Strother	62	65"	2.83	115	4.03	70%	suitable
Interpretation: normal lung function tests									
Er. Ex. 18	1-31-90	Fino	62	64"	2.79	89	4.10	68%	
					2.70	102	3.87	69%	
Interpretation: minimal obstruction of no clinical significance									
Er. Ex. 14	2-1-90	Strother	62	65"	2.82	109	3.99	71%	suitable
Interpretation: normal lung function tests									

Blood Gas Studies

Ex. No.	*Date*	*Physician*	*PCO2*	*PO2*	*Interpretation*
Dir. Ex. 23	2-21-89	Miner's Hospital	37 39	89 90	—
Dir. Ex. 43	4-17-89	Pickerill	35.9	74.6	normal but for mild reduction in PO2
Er. Ex. 6	9-28-89	Begley	30 41	88 87	normal
Er. Ex. 18	1-31-90	Fino	42.5	78.3	normal
Er. Ex. 14	2-1-90	Strother	40 43	68 71	PO2 mild reduced at rest

Other Relevant Evidence

Director's Exhibit 21 contains records of examinations and testing performed at the Coal Workers' Clinic of Miner's Hospital of Northern Cambria dating from 1981 to 1989. (*See also* Cl. Ex. 1; Dir. Ex. 17-19). Per Dr. G. V. Ignacio pneumoconiosis and chronic obstructive pulmonary disease were diagnosed and bronchodilators were prescribed; the Claimant's level of functioning was characterized as minimal or moderately restricted to markedly restricted.

Dr. Sabo submitted a report dated February 20, 1989 (Dir. Ex. 22). The Claimant's work history, medical history, symptoms, and the results of the Claimant's

physical examination, chest x-ray, pulmonary function study and blood gas study were listed (*See* Dir. Ex. 20, 23, 25). Chronic obstructive pulmonary disease with pneumoconiosis due to coal dust exposure and chronic bronchitis secondary to cigarettes were diagnosed. Dr. Sabo assessed the Claimant's degree of impairment as 90% due to chronic obstructive pulmonary disease with pneumoconiosis related to coal dust exposure and 10% due to chronic bronchitis secondary to cigarettes.

Dr. Robert C. Pickerill examined the Claimant April 17, 1989 (Dir. Ex. 43). He discussed the Claimant's work history, symptoms, medical history, and the results of a physical examination, blood gas study, pulmonary function study, electrocardiogram and chest x-ray. Dr. Pickerill's diagnoses were:

1. No radiographic evidence of coal workers' pneumoconiosis.
2. Chronic bronchitis based upon subjective symptoms of chronic productive cough.
3. Mild chronic obstructive pulmonary disease (COPD) based upon minor abnormalities on pulmonary function testing and a history of treatment with Theolair.

Dr. Pickerill stated that the Claimant does not have definite medical evidence of coal workers' pneumoconiosis. He found the Claimant's mild chronic obstructive pulmonary disease and chronic bronchitis are most likely due to his previous tobacco smoking, but symptoms of chronic bronchitis can be exacerbated by dust exposure.

Based upon his examination and testing of the Claimant, however, Dr. Pickerill concluded that the mild chronic obstructive pulmonary disease and chronic bronchitis have not resulted in a significant functional respiratory impairment which would be severe enough to

prevent him from doing the physical requirements of his last job as a pipeman in the coal mining industry.

Dr. Raymond L. Dandrea submitted a report dated July 24, 1989 (Cl. Ex. 1). He stated that he has been the Claimant's family physician for over 20 years and that the claimant has been evaluated annually at the Coal Workers' Respiratory Clinic since 1981. *See* Clinic notes at Dir. Ex. 21, discussed *supra; see* also Dir. Ex. 17-19. Dr. Dandrea stated that the Claimant had been complaining of an occasional cough and increasing shortness of breath with exertion for the past 15 years and in August 1988 complained that it reached the point that he was short of breath doing normal work activities and simple activities around the house as well as experiencing occasional chest pain. Despite treatment with Theophylline Compounds, which the Claimant had been prescribed for seven to eight years, the Claimant's symptoms progressed to the point that he could no longer do his job and stopped working January 1989 on Dr. Dandrea's advice. Dr. Dandrea referred to the Clinic notes at Dir. Ex. 21 and stated that he agreed with the clinic physicians. Dr. Dandrea stated that it has been his opinion that the Claimant is suffering from coal workers' pneumoconiosis and chronic obstructive pulmonary disease which are the direct result of his exposure to the coal dust in his years of coal mine employment and that he feels the Claimant has been totally disabled from further work in the coal mines as he advised the Claimant in January 1989. Dr. Dandrea continues to prescribe Theophylline Compound, Theodur, to the Claimant.

Dr. Christopher J. Begley examined the Claimant September 28, 1989 (Er. Ex. 6). Based on the Claimant's medical history, work history, symptoms, and the results of a physical examination, chest x-ray, blood gas study, electrocardiogram and pulmonary function study,

Dr. Begley's impressions were:

1. Obstructive disease of the small airways
2. History of smoking

It was Dr. Begley's opinion that the Claimant is not suffering from an occupational pneumoconiosis or any other occupational lung disease and that the Claimant would be capable of returning to his previous employment in the coal mines. Dr. Begley found that the Claimant's obstructive disease of the small airway is non disabling and is a direct consequence of his long history of cigarette smoking.

Dr. Vijay K. Malhotra examined the Claimant November 2, 1989 (Cl. Ex. 4). He discussed the Claimant's symptoms, work history, medical history, and the results of an electrocardiogram, chest x-ray, and pulmonary function study. Dr. Malhotra's impression was simple coal workers' pneumoconiosis, type q, profusion 0/1, involving all six zones. Dr. Malhotra stated that the Claimant developed pneumoconiosis as a result of his exposure of coal dust in his job and that a pulmonary disability is present. He considered the Claimant totally disabled from performing his coal mine work or labor of a similar nature.

Dr. Begley was deposed January 9, 1990 (Er. Ex. 19). He discussed his September 28, 1989 examination and testing of the Claimant and review of the Claimant's medical records. He repeated his conclusion that the Claimant is not suffering from pneumoconiosis or any other occupational lung disease and is capable from a pulmonary standpoint of performing his job of a pipeman. He stated that he found evidence of obstructive disease of the small airways, but explained that it was non-disabling and a consequence of cigarette smoking. His opinion was not changed by his review of the other

medical evidence asserting total disability due to pneumoconiosis.

Dr. George W. Strother examined the Claimant January 12, 1990 (Er. Ex. 14). His report concluded the Claimant's work history, medical history, symptoms, and the results of a physical examination, chest x-ray, pulmonary function study and blood gas study. Dr. Strother diagnosed:

1. Chronic bronchitis based on related history of daily cough productive of sputum for 5 years.
2. Mild hypertension based on recorded blood pressures.

Dr. Strother concluded that he found no evidence of dust pneumoconiosis or pulmonary impairment and that the Claimant is able to do his usual coal mine work based on normal pulmonary reserve and capacity. Dr. Strother reviewed other evidence of record including Drs. Dandrea's and Malhotra's reports and the coal workers' clinic records; his opinion was not changed.

Dr. Gregory J. Fino examined the Claimant January 31, 1990 (Er. Ex. 18). He discussed the Claimant's symptoms, medical history, work history, as well as the results of a physical examination, chest x-ray, pulmonary function study, blood gas study and electrocardiogram. He also reviewed the other medical evidence in the record. Dr. Fino's conclusions were:

1. There is insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis.
2. It is my opinion that this man does not suffer an occupationally-acquired pulmonary disease.
3. There is clinically insignificant respiratory impairment related to cigarette smoking and tobacco use present.

4. From a respiratory standpoint this man is neither partially nor totally disabled from returning to his last mining job, or a job requiring similar effort.

Dr. Strother was deposed February 6, 1990 (Er. Ex. 20). He discussed his January 12, 1990 examination and testing of the Claimant and review of the medical evidence. He repeated that it was his opinion that the Claimant does not have coal workers' pneumoconiosis or a pulmonary impairment and from a pulmonary standpoint could perform his last duties of a pipeman. He explained that two pulmonary function studies were conducted (January 12, 1990 and February 1, 1990) because on January 12, 1990 Theolair was taken four hours before testing and February 1, 1990 it was taken 16 hours before testing; he found no fundamental difference in the test results (both were normal).

Dr. Dandrea was deposed February 15, 1990 (Er. Ex. 21). He repeated that he had been the Claimant's family physician for over 20 years and stated that he felt it would be in the Claimant's best interest to quit working in January 1989 because of pulmonary disease. He cited findings on physical examination, chest x-ray interpretations from the coal workers' clinic, and the results of a two-step exercise test as support for his opinion. Dr. Dandrea acknowledged that the pulmonary function studies and chest x-rays performed at the clinic did not show a progression of any disease process but noted that over the years the Claimant reported his decreased ability to do work at the mine or at home due to shortness of breath and that he felt the Claimant definitely showed a decreased exercise tolerance. Dr. Dandrea recognized that aging generally can be a factor in one's decreased ability to perform a task but that he would not

expect it to be that marked at the Claimant's age and acknowledged that the Claimant has also suffered bouts of arthritis, bursitis, numbness, back pain, and heel pain. Dr. Dandrea agreed that the results of the Claimant's pulmonary function studies did not support a finding of diability from a pulmonary standpoint but stated that he relied on the fact that the Claimant was unable to do what he had done in previous years citing the results of a two-step exercise test. Dr. Dandrea agreed that the treadmill test performed by Dr. Strother one year later, January 1990, produced normal results. With regard to a possible heart problem, Dr. Dandrea stated that the Claimant's electrocardiograms were repeatedly normal. (*Cf.* Dr. Fino's findings at Er. Ex. 18). With regard to his prescription of Theodur, Dr. Dandrea reported that the Claimant noted definite improvement with his breathing with it and denied Dr. Strother's assertion that the drug had a placebo-like effect on the Claimant. *See* Dr. Strother's report (Er. Ex. 14) and deposition (Er. Ex. 20). Dr. Dandrea stated that it remained his opinion that the Claimant is suffering from coal workers' pneumoconiosis and chronic obstructive pulmonary disease resulting from coal dust exposure and that the Claimant is totally disabled from further coal mine work. Dr. Dandrea stated that smoking may partially contribute to the Claimant's chronic obstructive pulmonary disease and that both the coal workers' pneumoconiosis and chronic obstructive pulmonary disease contributed to the Claimant's disability. Dr. Dandrea admitted that to some extent his telling the Claimant not to do coal mine work is a prophylactic restriction because to continue to work may have put the Claimant in a severe pulmonary state.

Applicable Regulations

As the Claimant filed his application for benefits on January 31, 1989, the amended regulations at Part 718 are applicable. These regulations require that the Claimant prove: (1) the existence of pneumoconiosis; (2) that the disease arose from coal mine employment; and (3) that he is totally disabled as a result of the disease. *Perry v. Director, OWCP,* 9 BLR 1-1 (1986).

Pneumoconiosis

Section 718.202 provides that the existence of pneumoconiosis can be established by x-ray;[7] autopsy or biopsy; by the presumptions contained in §§ 718.304, 718.305, or 718.306; or by the report of a physician exercising sound medical judgment stating that the Claimant suffers from pneumoconiosis.

There are 44 x-ray interpretations in the record. When x-ray readings are conflicting, as they are in the instant case, the readers' radiological qualifications must be considered under § 718.202(a)(1). Readers who are both Board-certified in radiology and National Institute of Occupational Safety and Health certified B-readers are considered the most qualified. *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985). Here there are a total of 33 x-ray interpretations offered by Drs. Wolfe, Palmer, Mathur, Sargent, and Patterson, all Board-certified radiologists and B-readers. I note that there is disagreement among these expert readers as to the existence of pneumoconiosis. Dr. Mathur read five of the Claimant's

[7] A chest x-ray classified as Category 1, 2, 3, A, B, or C establishes the existence of pneumoconiosis. A chest x-ray classified as Category 0, including the subcategories 0/-, 0/0, or 0/1, is not accepted as evidence of pneumoconiosis. *See* § 718.102(b).

x-rays, including the more recent 1990 x-rays, as positive for pneumoconiosis. I note that each of Dr. Mathur's positive readings was countered by two equally-qualified readers' interpretation of the x-ray as negative.[8] However, I am not impressed or persuaded by the fact that the Employer was able to produce a greater number of negative interpretations.[9] I find the fact that at least one Board-certified radiologist and B-reader repeatedly found evidence of pneumoconiosis significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations. True doubt is to be resolved in favor of the Claimant. *Provance v. United States Steel Corporation,* 1 BLR 1-483 (1978).

The Claimant has proved the existence of pneumoconiosis.

Causation

Section 718.203 provides: "In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment." Subsection

[8] I note that on their x-ray classification forms Dr. Palmer in two instances and Dr. Wolfe in one instance found no parenchymal abnormalities consistent with pneumoconiosis but indicated "yes" there were pleural abnormalities consistent with pneumoconiosis. I do not consider the notation of pleural abnormalities alone sufficient to establish pneumoconiosis. The regulations speak of establishing pneumoconiosis by opacities (parenchymal abnormalities). *See* 718.102(b), footnote 7 *supra; see* also Dr. Wolfe's cover letter associated with Er. Ex. 22.

[9] The process of weighing the x-ray evidence involves more than counting the number of positive versus negative readings.

It is important to keep in mind the remedial nature of the Act. It was designed to be liberally construed as a health and safety statute.

(b) specifies: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be rebuttable presumption that the pneumoconiosis arose out of such employment."

It is presumed that the Claimant's pneumoconiosis arose out of his coal mine employment. There was no evidence offered to establish that the pneumoconiosis arose out of a cause other than coal mine employment. The § 718.203(b) presumption is not rebutted.

The Claimant has proved that his pneumoconiosis arose out of coal mine employment.

Total Disability

Section 718.204 provides that total disability may be established in a living miner's claim by pulmonary function study evidence; arterial blood gas study evidence; evidence of cor pulmonale; or by the opinion of a physician which concludes that a miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work[10] or comparable and gainful work. *See* § 718.204(c)(1) through (c)(4).

None of the blood gas studies produced values indicative of total disability.

[10] Usual coal mine employment is defined as the most recent job a miner performed regularly and over a substantial period of time. *Daft v. Badger Coal Co.*, 7 BLR 1-124 (1984). The Claimant testified that he worked his last five to six years at Greenwich Collieries as a pipeman (Tr. 13-14; *see also* Dir. Ex. 14). As a pipeman the Claimant moved, dismantled, and assembled pipes in various parts of the mine including along the beltline, waterpumps (Tr. 13; Dir. Ex. 14). Physically, this job required the Claimant to be constantly dragging pipe weighing up to 150 to 200 pounds (Tr. 13-14; Dir. Ex. 14).

There is no evidence in the record to suggest the Claimant suffers from cor pulmonale.

Finally, there are the opinions of eight physicians in the record. Drs. Ignacio's, Dandrea's, Sabo's and Malhotra's reports support the conclusion that the Claimant is disabled by pneumoconiosis.[11] Drs. Pickerill's, Begley's, Strother's and Fino's reports support the conclusion that the Claimant is not totally disabled due to pneumoconiosis; indeed, they do not find the Claimant to have pneumoconiosis or be disabled from a pulmonary standpoint.[12]

I recognize that Drs. Pickerill, Begley, Strother and Fino are highly-qualified Board-certified pulmonary specialists and that their opinions warrant special consideration on that basis. I must also give special consideration to Dr. Dandrea's opinion, however, as the record demonstrates that he has been the Claimant's treating

[11] Drs. Dandrea and Malhotra characterized the Claimant as totally disabled and found him unable to perform his usual coal mine work. Dr. Ignacio's clinic notes rated the Claimant's level of functioning at one point as markedly restricted; considering the exertional requirements of the Claimant's usual coal mine job, *see* footnote 10 *supra*, I find total disability can be inferred. Dr. Sabo apparently found the Claimant to suffer some degree of impairment as he attributed 90% of that impairment to chronic obstructive pulmonary disease with pneumoconiosis related to coal dust exposure and 10% of the impairment to chronic bronchitis secondary to cigarettes; again, considering the exertinoal requirements of the Claimant's usual coal mine employment disability can be inferred.

[12] Drs. Pickerill, Begley, Strother and Fino related any pulmonary disease to the Claimant's smoking history. The Claimant testified that he smoked on average a pack to a pack and a half of cigarettes a day from age 16 (1943) to 1967 (Tr. 15); he smoked one to two pipefuls a day from age 40 (1967) to age 59 (1986) (Tr. 19).

physician for over 20 years. As such, he has had the unique opportunity to observe the Claimant's condition over time; he has also had the benefit of Dr. Ignacio's opinion based on examination and tests performed at the coal workers' clinic over the years. At his deposition Dr. Dandrea was confronted with the opinion of the Claimant's pulmonary and radiological experts. He acknowledged the 0/1 x-ray readings, that the results of the Claimant's recent pulmonary function and exercise studies may not establish total disability, and defended the benefits of his prescription of breathing medication to the Claimant. Notwithstanding the experts opinions, it remained Dr. Dandrea's opinion based on his observation of the Claimant over the years that the Claimant is totally disabled by coal workers' pneumoconiosis and chronic obstructive pulmonary disease. I find the fact that the Claimant's treating physician considers him totally disabled to raise true doubt in face of the Employer's experts opinions. As stated above, true doubt is to be resolved in favor of the Claimant.

The Claimant has proved that he is totally disabled by pneumoconiosis.

Conclusion

The Claimant has proved: (1) the existence of pneumoconiosis; (2) that the disease arose from coal mine employment; and (3) that he is totally disabled as a result of the disease. The Claimant is entitled to benefits.

Attorney Fees

No award of attorney's fees for services to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby

allowed for the Claimant's counsel to submit an application. The application must conform to 20 C.F.R. §§ 725.365 and 725.366, which set forth the criteria for consideration of the request. The application must be accompanied by a service sheet showing that service has been made on all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served have 10 days following receipt to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of approval of such application.

ORDER

The Responsible Operator is hereby ordered to provide for payment:

1. To the Claimant of all benefits to which he is entitled commencing January 1, 1989,[13] augmented by his dependent wife Rose;

2. Pay or otherwise provide for all medical and hospitalization benefits to which the Claimant is entitled;

3. Pay to the Secretary of Labor reimbursement for any payment the Secretary has made to the Claimant on or after March 1, 1978, under the Act and deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraphs 1 and 2 above;

---

[13] The Employer stated among its contested issues that the Claimant was receiving sickness and accident benefits from January 11, 1989 (Dir. Ex. 46). No evidence as to such benefits exists in the record. The Claimant ceased working as a miner on January 4, 1989 (Tr. 11). He stated that he receives no State Workers' Compensation benefits (Tr. 18). Finding no basis in the record for determining that the Claimant was on the Employer's payroll, after January 4, 1989, I find that he ceased employment on that date and set the date of entitlement to benefits accordingly.

4. Pay to the Claimant or to the Secretary of Labor, as appropriate, interest from 30 days after the initial determination of entitlement by the Department of Labor until the date upon which payment is actually paid. The rate of interest payable is that rate effective, pursuant to 20 U.S.C. § 1961(a), on the date this Decision and Order is filed by the Deputy Commissioner. *See Bethlehem Mines Corp. v. Director, OWCP,* 766 F.2d 128 (3d Cir. 1985).

/s/ Joan Huddy Rosenzweig

JOAN HUDDY ROSENZWEIG
Administrative Law Judge

JHR/KLB:mr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036. *A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Francis Perkins Building, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3270

GREENWICH COLLIERIES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ANDREW ONDECKO, RESPONDENTS

[Filed June 25, 1993]

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and ROSENN,* *Circuit Judges*

The petition for rehearing filed by respondent Director, Office of Workers' Compensation Programs, United States Department of Labor, in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

---

* Hon. Max Rosenn, United States Circuit Judge, was limited to voting for panel rehearing.

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Judge Becker would grant rehearing.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

DATED: June 25, 1993

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-3222

MAHER TERMINALS, INC., PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND PASQUALINA SANTORO, RESPONDENTS

[Filed June 25, 1993]

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and ROSENN,* *Circuit Judges*

The petition for rehearing filed by respondent Director, Office of Workers' Compensation Programs, United States Department of Labor, in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

* Hon. Max Rosenn, United States Circuit Judge, was limited to voting for panel rehearing.

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker would grant rehearing.

By the Court,

/s/ William D. Hutchinson

Circuit Judge

DATED: June 25, 1993

☆ U.S. GOVERNMENT PRINTING OFFICE: 1993—301-157/88049

(2) (2)

Nos. 93-474, 93-744

Supreme Court, U.S.
FILED
DEC 10 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Petitioner,

—v.—

MAHER TERMINALS, INC.,

Respondent/Cross-Petitioner,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT/CROSS-PETITIONER IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
Attorneys for Respondent/ Cross-Petitioner
26 Broadway
New York, New York 10004-1882
(212) 422-6111

BEST AVAILABLE COPY

50 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF JURISDICTION	3
SUMMARY OF ARGUMENT	4
STATEMENT PURSUANT TO RULE 15 OF PERCEIVED MISSTATEMENTS OF FACT AND LAW	8
ARGUMENT	19
THE ORIGINS AND ERROR OF THE DOUBT RULE	19
CONCLUSION	28

TABLE OF AUTHORITIES

Cases	PAGE
Addington v. Texas, 441 U.S. 418 (1979)	8
Atlantic Marine, Inc. v. Bruce, 661 F.2d 898 (5th Cir. 1981)	18
Avondale Shipyards v. Kennel, 914 F.2d 88, 90-91 (5th Cir. 1990)	10
Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932)	18
Barnson v. U.S., 816 F.2d 549 (10th Cir. 1987)	28
Bath Iron Works Corp. v. White, 584 F.2d 569 (1st Cir. 1978)	10
Betz v. Arthur Snowden Company, 14 BRBS 805 (1981)	2, 9
Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983)	18
Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962)	19
Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947)	20
Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976)	6
Consumer Products Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	28
DelVecchio v. Bowers, 296 U.S. 280 (1935)	20, 26, 28
Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979)	29

	PAGE
Eschbach v. Contractors, Pacific Naval Air Bases, 181 F.2d 860 (7th Cir. 1950)	19, 20
F.H. McGraw & Co. v. Lowe, 145 F.2d 886 (2d Cir. 1944)	19
Fidelity & Casualty Co. v. Burris, 59 F.2d 1042 (D.C. Cir. 1932)	19, 21
Freeman United Coal Mining Co. v. Director, OWCP, 999 F.2d 291 (7th Cir. 1993)	28
Gober v. Matthews, 574 F.2d 772 (3rd Cir. 1978)	16
Gooding v. Willard, 209 F.2d 913 (2d Cir. 1954)	19
Greenwich Collieries v. Director, OWCP, 990 F.2d 730 (3rd Cir. 1993)	4, 6, 12, 17, 21
Gunning v. Cooley, 281 U.S. 90 (1930)	24
Hensley v. Wash. Metro Area Transit Authority, 655 F.2d 264 (D.C. Cir. 1981)	10
Hughes v. Dist. of Col. Greater Wash. Labor Council, 498 A.2d 567 (D.C. 1985)	29
Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966)	18
Lincoln v. Virgil ___ U.S. ___, 113 S.Ct. 2024 (1993)	28
Martin v. OSHRC, 111 S.Ct. 1171 (1991)	6
Mid-Gulf Stevedores, Inc. v. Neuman, 462 F.2d 185 (5th Cir. 1972)	10
Mobile, J&K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910)	17
Morrison-Knudsen Const. Co. v. Director, OWCP, 461 U.S. 624 (1983)	29

PAGE

Mullins Coal v. Director, OWCP, 484 U.S. 135 (1987) .9, 27-29

New York C.R. Co. v. Ambrose, 280 U.S. 486 (1930).. 24

NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292 at 300 (1939) 6, 7, 22, 23. 24

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).....3, 23

Noble Drilling Co. v. Drake, 795 F.2d 478 (5th Cir. 1986).....10, 24, 25, 27, 28

Parsons Corp. of Cal. v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980) 10

Patton v. Texas P.R. Co., 179 U.S. 658 (1901)..... 24

Southern Pacific Co. v. Sheppeard, 112 F.2d 147 (5th Cir. 1940) 19

Southern S.S. Co. v. Norton, 101 F.2d 825 (3rd Cir. 1939)..... 19

Sprague v. Director, OWCP, 688 F.2d 886 (1st Cir. 1982) 10

Steadman v. SEC, 450 U.S. 91 (1981) 3, 6, 7

Stevenson v. Linens of the Week, 688 F.2d 93 (D.C. Cir. 1982)..... 10

Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962) 16

U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982).....20, 26, 27

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 20

Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968)..... 22

PAGE

Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968)..... 24

White v. Abrams, 495 F.2d 724 (9th Cir. 1974)..... 25

Young & Company v. Shea, 397 F.2d 185 (5th Cir. 1968).....20, 21, 22

Statutes and Rules

Title 5 U.S.C. Section 554 1

Title 5 U.S.C. Section 556 ..... 3, 6

Title 5 U.S.C. Section 557 ..... 3, 9

Title 28 U.S.C. Section 1254 4

Title 30 U.S.C. Section 901 *et seq*. 4, 21

Title 33 U.S.C. Section 901 *et seq*. 1

Title 33 U.S.C. Sections 902(2) and (10).....18, 20, 25

Title 33 U.S.C. Section 903.....18, 20, 21, 25

Title 33 U.S.C. Section 907..... 1

Title 33 U.S.C. Section 908..... 1

Title 33 U.S.C. Section 909..... 1

Title 33 U.S.C. Section 919 .....1, 3, 23

Title 33 U.S.C. Section 920 .....2, 10, 16, 17, 20, 21, 24, 25, 26, 27, 28

Title 33 U.S.C. Section 921 .....2, 16, 28, 30

Title 33 U.S.C. Section 923..... 5

Federal Rule of Evidence 301..... 20

Federal Rule of Evidence 401 .....10, 11

PAGE

20 C.F.R. Part 702 5

Other Authorities

Weinstein's *Evidence*, Vol. I, Rules 101-403 .....27, 28

STATEMENT OF THE CASE

Petitioners, Pasqualina Santoro, and the Solicitor General of the United States on behalf of the Director, Office of Workers' Compensation Programs ("OWCP"), seek review of the April 19, 1993 decision of the United States Court of Appeals for the Third Circuit vacating an Administrative Law Judge's award of benefits for Mrs. Santoro's late husband's medical expenses, disability and death pursuant to Sections 907, 908, 909 [Sections 7, 8 and 9] of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Sections 901, *et seq.* [1972], and remanding for further proceedings. The ALJ, by decision and order dated November 22, 1988 following hearing provided by Longshore Act Section 19(d), which ". . . shall be conducted in accordance with Section 554 of Title 5 of the United States Code [the Administrative Procedures Act, 5 U.S.C., Section 551, *et seq.*]" (Pub. L. 92-576 (1972)), awarded benefits after review of the conflicting evidence on the issue of "causality" between Mrs. Santoro's husband's injury at work for respondent, Maher Terminals, Inc. on July 23, 1985 and his death March 11, 1986, due to "cardiac arrest" as "a consequence of . . . cervical astrocytoma" (A-29)[1]. The factfinder did not, however, decide whether or not injury at work, on account of which compensation for temporary total disability pursuant to the Act's Section 8(b) had been paid, had, in fact, contributed to the harm to Mrs. Santoro for which benefits were sought, as a result of her late husband's disability after he returned to work August 1, 1985 and his allegedly hastened death. Instead, the Administrative Law Judge rejected respondent's evidence denying causal connection between employment and disability and death caused by cancer, not as incredible or inaccurate, but because ". . . inconsistent with the purposes and policy of the

---

[1] References preceded by "A" identify Appendix pages in Mrs. Santoro's petition (93-474). Those followed by "a" are found in the petition of the Director, OWCP, United States Department of Labor (93-744). References followed by "AM" are to pages in the Appendix to this Brief.

[Longshore] Act" (A-44). Not having weighed respondent's proof in relation to Mrs. Santoro's evidence, the Administrative Law Judge held nonetheless: "The issue of causality is still deemed debateable, but the doubt is resolved in favor of the Claimant" (A-44). As a result of applying what petitioners describe as the "true doubt rule", the ALJ ". . . found and concluded that . . . disability and death is causally related to . . . [the] . . . accident on July 23, 1985" (*Ibid*). In his December 15, 1988 "ruling" denying respondent's petition for reconsideration, the Longshore Act factfinder observed ". . . the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of the Administrative Procedures Act and the views expressed by the Benefits Review Board in *Betz v. Arthur Snowden Company*, 14 BRBS 805 (1981)" (A-46).

By decision March 27, 1992 the Benefits Review Board, empowered to hear and determine appeals ". . . based upon the hearing record . . ." pursuant to Longshore Act Section 21(b)(3), affirmed, determining that the award was ". . . supported by the substantial evidence in the record considered as a whole", a decision from which respondent appealed to the Court of Appeals for the Third Circuit as provided by the Act's Section 21(c). In an opinion filed April 19, 1993 (992 F.2d 1277) that court reversed, holding that Mrs. Santoro was required—the Longshore Act Section 20(a) presumption ". . . [t]hat the claim comes within the provisions of this chapter . . ." having been rebutted and there being no issue of right to benefits dependent upon respondent establishing an affirmative defense—to prove her entitlement by the preponderance of the evidence.

The court of appeals considered the issues in two parts: whether the Administrative Procedures Act "prohibits the application of the true doubt rule" because it establishes a standard of proof by the preponderance—something different from whether the same standard existed prior to Procedures Act adoption—and whether the APA also required that this

burden in Mrs. Santoro's case be allocated to the benefits claimant. In rejecting application of a rule of doubt in Longshore Act benefits claim factfinding, the court of appeals held that because the Longshore Act Section 19(d) incorporates the APA, Section 556(d), i.e., the Administrative Procedures Act Section 7(c), controlled. It interpreted *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) as holding that the first sentence of the Section 556(d), which provides: "Except as otherwise provided by statute, the proponent of a rule of order has the burden of proof", refers only to the burden of production. But it also decided that *Steadman v. SEC*, 450 U.S. 91 (1981) held that the third sentence of Section 7(c): "A sanction may not be imposed or ruled or order issued except . . . [when] . . . supported by and in accordance with the reliable, probative, and substantial evidence" established a "standard of proof" by the "preponderance of the evidence". With respect to who should bear the burden of persuasion and, with that, the risk of decisional error, the court of appeals concluded that the only interpretation of the first and third Section 7(c) sentences which would not ". . . contravene the statute or suggest an impossibility is one which allocates the burden of persuasion to the proponent of the order, i.e., the party initiating the proceeding, on the issues raised by that party, but allows the burden to be shifted . . . as to issues raised by the opponent, i.e., affirmative defenses." So holding, the court of appeals remanded since "[I]t is not clear if the ALJ . . . ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard".

STATEMENT OF JURISDICTION

On September 23, 1993 petitioner Santoro filed a timely petition for writ of certiorari seeking restoration of her award of benefits. On October 22, 1993 respondent filed a cross-petition asking in the event Mrs. Santoro's petition was granted for a writ in order to have this Court review the appropriateness of the order of remand. On November 10,

1993 the Solicitor General filed a petition on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor seeking review of the decision of the Third Circuit Court of Appeals in Mrs. Santoro's case and in *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, decided by the same court March 23, 1993, which is said to involve issue of the alleged "true doubt rule" in claims brought under the Black Lung Benefits Act, 30 U.S.C. Section 901, *et seq*. The Court has jurisdiction pursuant to 28 U.S.C., Section 1254(1).

SUMMARY OF ARGUMENT

Mrs. Santoro's case is presented by the court of appeals' analysis and petitioners' argument as involving issue of whether Longshore Act decisional law prior to APA enactment[2], which allegedly allocated the burden of persuasion on all entitlement issues to the employer, controls with the claimed result that the true doubt ruled is valid, or but for the APA would be valid; or, instead, as the court of appeals' opinion might be read as suggesting but does not hold, adoption of the Procedures Act altered existing law by imposing a burden of persuasion by the preponderance of the evidence upon the benefits claimant. The Solicitor acknowledges (Pet., pp. 21-22) that the standard of proof on every Longshore Act benefits claim issue *is* the preponderance, but asserts that what is said to be the traditional allocation of the risk of non-persuasion was improperly disturbed because the court of appeals' interpretation of the Procedures Act reveals an "ambiguity . . ." which is "best accommodated, not . . . by placing the risk of non-persuasion always on the party seeking to change . . . the *status quo* . . . , but by allowing the Agency to determine . . . which party should bear that risk . . ." (Pet., p. 22). The Solicitor thus describes the doubt rule as involving nothing more than allocation of the risk of non-

[2] Act of June 11, 1946, c. 324, 60 Stat. 237.

persuasion; and for this reason it can be applied *only when* the conflicting evidence has been determined to be of identical perceived credibility and accuracy. The government justifies the Agency's alleged right to make the allocation because ". . . the principle that doubts are resolved in favor of the claimant was firmly established as a rule of construction under the . . . [Longshore Act] . . . when the . . . [Administrative Procedures Act] . . . was enacted (Pet., p. 23); and that "the 'true doubt rule' represents, in effect, the Secretary's administrative judgment, developed in conjunction with and long accepted by the courts that . . . [the] . . . risk [of non-persuasion] should rest on the employer" (Pet., p. 16). By arguing "deference" the government claims that the Secretary of Labor has the right to transfer the burden of persuasion to the employer on every entitlement issue in the event the courts have not done so, despite the fact that there is no evidence that the Agency ever believed itself so empowered. In no Longshore Act regulation is provision made for a rule of doubt in administrative law judge determinations of fact despite the Act's Section 23(b). See, 20 CFR Part 702.

The "true doubt rule", which both petitioners misdescribe, does *not* merely reallocate the risk of non-persuasion, it creates a standard of proof applicable to evidence presented by the claimant which is not only less than by the preponderance it is so much less that the risk of failure to abolish "any" doubt on all issues belongs to the employer. Nonetheless, both petitioners claim that evidentiary "equipoise", or that the proof supporting or opposing entitlement to benefits be found "equally probative" or "evenly balanced", is required before the rule may be applied. This supposed threshold of doubt rule applicability is, however, not found in the decisions of the courts of appeals and by the Benefits Review Board; and in no case is the rule's use rejected because the only allegedly required determination was not made by the finder of fact. The rule, which petitioner Santoro claims ". . . is not an affirmative rule of evidence or procedure but is a deadlock

breaking device" which is "within the discretion of the fact finder" to employ (Pet. p. 7), since admittedly not a principle of required application, *cannot* be law. The government's effort to justify the rule by describing it as a mere reallocation device applicable after weighing in the event conflicting evidence is found to be in "equipoise"—considered in light of what in *Maher Terminals, Inc.* and *Greenwich Collieries v. Director, OWCP* were the actual bases of the awards of benefits—establishes that the Agency's argument, which in any event is not an interpretation of any Longshore Act provision, is a *post hoc* rationalization entitled to no deference. *Martin v. OSHRC*, ___ U.S. ___, 111 S.Ct. 1171, 1179 (1991).

That there is any "doubt rule" applicable to Longshore Act benefit claim finding of fact is rejected by this Court's precedent. Most fundamentally, since the true doubt rule lessens the standard of proof below the preponderance of the evidence as the court of appeals held (992 F.2d at 1285), it contradicts not only the Administrative Procedures Act but this Court's "substantial evidence" definition as well. In *Steadman v. SEC*, *supra*, this Court observed (450 U.S. at 99) that Section 7(c) "in accordance with" meant "not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury", which as the Court said is substantial evidence as defined in *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939). It did so in holding that the Procedures Act established a standard of proof *less than* applicable decisional law provided before APA enactment. As this Court also held (450 U.S. at 100 n.20), because ". . . the reviewing court is not to weigh the evidence . . .", the "functions of initial decisionmaking and judicial review of it" are "different", for which it cited *Charlton v. FTC*, 543 F.2d 903 at 907 (D.C. Cir. 1976), a case which holds: "Nowhere in our jurisprudence [i.e., *in American law*] have we discerned acceptance of a standard of proof tolerating something less than the weight of the evidence". In

Steadman the Court held further (*Ibid.* at 99): "Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of [adjudicative] error". It thus appears that the true *Steadman* holding is "not simply" that Administrative Law Judge's findings of fact had to be made pursuant to what *NLRB v. Columbian Enameling and Stamping Co.* required prior to APA enactment, but that, as a result of enactment of the APA, findings of fact must *always* be made, in absence of contrary provision in the authorizing statute, by the ALJ on the basis of what he or she deems to be the preponderant evidence. In sum, *Steadman v. SEC* need not be read as holding that the Procedures Act *created* the preponderance standard; and that it had not existed before its adoption. What *Steadman v. SEC*, *supra*, however, unquestionably holds, as a result of this Court's rejection of the dissenting view, that the APA should not alter existing standards established by decisional law before that enactment, is that, were there a doubt rule in Longshore Act factual determinations prior to adoption of the Procedures Act in 1946 as petitioners mistakenly claim, the APA abolished it.

The origin of a rule of doubt has also been inaccurately described by petitioners, since no such rule was *ever* applied to Longshore Act factfinding prior to 1968, more than 40 years after the Act's adoption[3]. Moreover, the rule cannot be valid unless factfinder doubt, itself, is substantial evidence, in which event Section 21 review becomes a matter whether it can be determined that the ALJ "properly considered" the conflicting evidence before awarding benefits, not by actually deciding the factual issues upon which entitlement to benefits depends, but after determining that "there is a significant basis for true doubt" that benefits should be denied.

---

[3] March 4, 1927, c.509, 44 Stat. 1424.

STATEMENT PURSUANT TO RULE 15 OF PERCEIVED MISSTATEMENTS OF FACT AND LAW

Both petitions urge validity of the "true doubt rule" because "[f]or fifty years or more" (Solicitor's Pet., p. 14) part of Longshore Act law. This alleged rule, which is concededly based upon the statute's "humanitarian" purpose or "policy" of "liberal" administration as opposed to any Longshore Act provision, applies in the event that the evidence is "equally probative" or is in "equipoise" on any and all "doubtful factual issues" (Santoro Pet., p. 6); or on ". . . those factual questions in which the evidence is found to be in equipoise" according to the Solicitor General (Pet., p. 15). Neither Mrs. Santoro nor the Solicitor clearly identifies what, if any, finding, other than that the factfinder is not convinced that benefits are *not* owed, is required before an Administrative Law Judge only *may* apply the "true doubt rule", i.e., whether a predicate determination that the conflicting evidence *is* of identical credibility and perceived accuracy must be made; or whether it is properly employed even when there is only doubt that benefits should be denied. Evidentiary "equipoise" with respect to each essential fact and a rule of doubt applied to all factual issues arising from contravention is not only meaningless, it cannot be reconciled with the reality that determinations from conflicting evidence are never doubt-free, as well as the fact that any standard of proof allocates the risk of decisional error (*Addington v. Texas*, 441 U.S. 418, 423 (1979)). In "equipoise" and "equally probative" are, moreover, ambiguous. For this reason, it is not sufficient for the Solicitor to claim that "the rule provides only that when the adjudicator finds the evidence on each side evenly balanced (taking account of both its quantity and its quality), the doubt finally remaining should be resolved in favor of the claimant" (Pet., p. 15). It as well as the assertion: "In the Secretary's view, an Administrative Law Judge should find the evidence evenly balanced only in narrow circumstances, after carefully considering all the evidence and exhausting all

methods of evaluating it" (*Ibid.*, p. 15) do not dispel uncertainty, they add it. It is not apparent what the Solicitor intends by the alleged requirement that the factfinder "take[ ] account of the quantity and quality of evidence". Similarly unclear is what an ALJ need do before it can be said that he or she "carefully consider[ed] all the evidence and exhaust[ed] all methods of evaluating it"? And what do petitioners intend "in equipoise", "equally probative" or "evenly balanced" actually mean? No answer is provided by the Solicitor's claim that the "rule provides that when evidence submitted by the claimant and the party opposing the award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant" (Pet., p. 4); or, contradictorily, since doubt is possible even when the conflicting evidence is thought to be of vastly disparate weight favoring denial of benefits when "weight" means credibility and accuracy, by quoting this Court's doubt rule description (*Mullins Coal v. Director, OWCP*, 484 U.S. 135, 144 n.12 (1987)), asserting that ". . . where true doubt exists, that doubt shall be resolved in favor of the claimant" (Pet. p. 25).

Use of the "true doubt rule" is affirmed by the Benefits Review Board in absence of any predicate finding which might be said to constitute a declaration of evidentiary "equipoise"; or demonstration even that the conflicting evidence has, in fact, been weighed for comparison of relative credibility or accuracy. APA Section 557(c)(3) to which neither petitioner refers, however, provides: "All decisions . . . shall include a statement of—(A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record". The Board's decision in *Betz v. Arthur Snowden*, 14 BRBS 805 (1981), which according to the Solicitor establishes procedural safeguards which make "the 'true doubt rule'. . . plainly permissible" (Pet., pps. 15-16), does *not* require a finding that the conflicting evidence is of equal credibility and perceived accuracy before the doubt rule may be applied.

The rule, instead, applies to any and all doubts as the Benefits Review Board held (A-21). See, e.g., *Avondale Shipyards v. Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1st Cir. 1978). Despite petitioners' description, the doubt rule in longshore cases has been said to apply in determining whether or not the Longshore Act Section 20(a) presumption, ". . . that the claim comes within the provisions of this chapter", has been rebutted and, hence, before evidentiary equipoise is possible. *Hensley v. Wash. Metro Area Transit Authority*, 655 F.2d 264, 267, 268 (D.C. Cir. 1981); *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). It has been further held that it need not be employed when the issue of entitlement to benefits is "close". *Sprague v. Director, OWCP*, 688 F.2d 886 (1st Cir. 1982). On the other hand, Longshore Act benefits have been awarded as a result of the doubt rule in absence of evidence which would meet the test of relevance defined in F.R.Evid. 401 as ". . . having any tendency to make the existence of a fact . . . more probable or less probable", i.e., when the evidence supporting compensability was only that a connection between employment and disability for which benefits were sought was "possible". *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986); *Mid-Gulf Stevedores, Inc. v. Neuman*, 462 F.2d 185 (5th Cir. 1972). Contrary to petitioners' description, the "true doubt rule", in fact, allows evidence which would not be admissible in any case tried to a jury to be the basis of an award of benefits; or, when claimant and the employer offer conflicting relevant proof, it dispenses with requirement that such evidence be weighed. Although neither petitioner says so, these two applications of the actual rule are reflected in the initial decisions in the cases subject to the Solicitor's petition; and Benefits Review Board's affirmance of both demonstrates that the rule cannot be reconciled with the petitioners' characterization of it, however vague. Instead, affirmance shows that the "true doubt rule" is actually an avoidance device which allows an ALJ to

award benefits without deciding the issues upon which the right to benefits depends. The "principle" which informs the actual rule is only that *no risk* benefits might be mistakenly denied should be tolerated.

Greenwich Collieries v. Director, OWCP

In the Black Lung Benefits Act case which the Solicitor would have this Court review, benefits were awarded after the evidence supporting compensability, on the basis of claim that there was X-ray evidence of the presence of pneumoconiosis, was found to be "significant enough to raise true doubt" (41a). Since as the Board acknowledged it cannot reweigh the evidence (18-19a), its affirmance establishes that the ALJ's finding means the same thing as the Board's determination that the factfinder had "properly discussed and weighed all relevant medical evidence" before finding conflicting readings of allegedly positive X-rays "equally probative" (20a). The award, however, does not reflect that this evidence was, in fact, weighed, since all the ALJ did was conclude that she was ". . . not impressed or persuaded by the fact that the employer was able to produce a greater number of negative interpretations" (41a). Thus, in the Board's view "probative" must mean "relevant" as defined in F.R.Evid. 401, since only judged by this standard is all evidence which can be said to be probative equally so. That this is so is apparent from the holding that the Administrative Law Judge did all that needed be done in deciding the issue of disability: The Board found that "her discussion of the medical evidence . . . supports . . . the inference that she had *properly considered* all the conflicting evidence" (22a, emphasis added). This means that an ALJ who in his or her discretion chooses to apply the rule need search only for some evidence in the record which if considered in isolation would support an award; but the factfinder need *not* actually either believe it or trust its accuracy, save, as will be shown, to the extent he or she decides it is not inherently incredible or patently unreasonable. In the

event the Benefits Review Board agrees that it is not, evidence "significant enough to raise true doubt" is substantial evidence supporting an award based upon a finding of doubt and not fact. Surely, the decision of the Benefits Review Board in *Greenwich Collieries v. Director, OWCP* establishes that as a result of the doubt rule it is proper for an ALJ to award benefits without conflicting evidence being found in "equipoise" after it has been exhaustively weighed, as the Solicitor has mistakenly suggested must be done before the rule may be invoked.

Maher Terminals, Inc. v. Director, OWCP

In Mrs. Santoro's case, although in denying rehearing the ALJ, unlike in *Greenwich Collieries v. Director, OWCP*, in fact, characterized the "conflicting evidence" as "equally probative" (A-46), he could not have weighed respondent's evidence which he rejected for reason of Longshore Act "policy". In addition, the basis for his award of benefits was doubt about an issue to which the parties *agreed*. The decision of the ALJ and the Benefits Review Board in Mrs. Santoro's case carries issue of the doubt rule in Longshore Act cases an additional step—doubt need not be a matter of evidence in the record and, instead, can arise in the mind of the factfinder despite agreement that doubt is baseless. Neither petitioner acknowledges that the Benefits Review Board recharacterized the ALJ's finding that the conflicting evidence had been "equally probative" as "in equipoise"; or that the Board also said without *any* basis that the Administrative Law Judge had found petitioner's expert's testimony "credible". For this reason, it determined that the witness' opinion, which was said correctly to have concerned only the effect of edema caused by trauma (1-7 AM)—which there is no evidence the Administrative Law Judge believed and which it is certain was *not* the basis of his award of benefits—required that it affirm. The Solicitor also affirmatively distorts the record in Mrs. Santoro's case—the government alleges that claimant's expert

testified that injury at work hastened disability and death "by aggravating a tumor that was previously dormant and might have remained so for years" (Pet., p. 9) despite the fact that this witness testified that pre-existing disease was an aggravating factor only because its presence supposedly made the effect of "edema" critical (6 AM). Moreover, the Solicitor (Pet., p. 10), as did the Benefits Review Board (A-23), claims the Administrative Law Judge "credited" the claimant's expert's opinion "anchored in his experience as a hands-on neurosurgeon", without acknowledging that the opinion was only that "Claimant (*sic*) sustained some type of traumatic insult to or around his neck of which he complained from the very beginning" (A-40).

In Mrs. Santoro's case the issue of "causality" between work related alleged whiplash injury (for which benefits had been paid until the day before deceased returned to work eight days after his injury) and subsequent disability and death from cancer of the cervical spinal cord was addressed at the Section 19(d) hearing by Bennett W. Derby, M.D., who testified for respondent, and by David I. Yazdan, M.D., a neurosurgeon who performed exploratory surgery on deceased August 19, 1985 and who testified as petitioner's medical witness. According to respondent's expert, deceased had astrocytoma for a "long, long time" before injury at work, a portion of which ". . . abruptly escalated, intrinsically, naturally, spontaneously, biologically in and of itself without reference to any external event into an accelerated much more malignant phase of growth which started literally breaking down the spinal cord and did so piece by piece" (A-39). The Administrative Law Judge rejected this evidence, not because of any lack of credibility or factfinder concern for accuracy, but on account of close temporal coincidence between occurrence of injury at work on July 23, 1985 and onset of catastrophic symptoms no later than August 15, 1985 (A-44). According to decedent's treating neurosurgeon's "edema theory" (A-37), upon which Mrs. Santoro relied exclusively to establish connection between her late husband's injury at

work and her entitlement to benefits, although deceased had preexisting astrocytoma, later disability and death did not result from progression of disease but, instead, were caused by swelling *within* the cord directly *caused by* injury at work. This "*edema*" was supposedly thereafter aggravated by ". . . the constant rubbing of the swollen spinal cord against the vertebral canal owing to . . . ordinary regular movement of his head [which] gradually increased the swelling" which "led to neurological breakdown and hastened his death" (A-35). An essential part of this witness' view of "causality" which respondent's expert said was "medically impossible" (A-32) was his testimony that deceased's astrocytoma—which his report of operation (12 AM) described as "quite thin and fluctuant" (indicating that deceased's tumor was highly malignant), had, instead, been ". . . slightly fluctuant, very firm and leathery in consistency" (A-35) (indicating to the contrary)—had *not* been "cancer" (8 AM). It was because this was supposedly so that petitioner's witness claimed that deceased "might have gone another 15 or 20 years before he would [have] become symptomatic" (A-42) but for edema caused by injury (A-23, 1 AM). Thus, deceased's doctor, in sponsoring an explanation for disability and death in which pre-existing disease was not the direct cause, denied that there *had been* any escalation in the degree of malignancy of deceased's tumor. He specifically testified that "the injury did not cause the tumor to grow" (1 AM) and that initial and subsequently increasing "edema" and/or its consequences did not ". . . make[ ] the tumor bigger or increase[ ] . . . cell growth or anything else" (3 AM). It was evidentiary agreement denying "causality" in the event escalation in level of malignancy had occurred; or testimony establishing it because of "edema" directly caused by injury without escalation occurring, which was described by the Administrative Law Judge as "equally probative". Neither petitioner has informed this Court that the award of benefits was *not* based upon the factfinder's inability to decide which opinion was the more credible or accurate.

The Administrative Law Judge did not sponsor the credibility of petitioner's witness "edema theory". In addition to finding, not that "the" testimony had been "inconsistent or contradictory" (A-44) but as the Benefits Review Board observed that petitioner's expert's had been (A-22), the ALJ held that ". . . there is some merit to the employer's position, taking into account the difference it pointed to in[. . . petitioner's doctor's] . . . testimony that, in effect, . . . [his] . . . opinion is a gratuitous 'theory' to put the claimant's case in the best light" (A-40). On the other hand the factfinder determined that respondent's expert's testimony provided a "high level of persuasion" on all issues other than whether deceased had sustained injury to his neck at work at all (A-40); but as he also noted, this witness testified in any event that deceased's astrocytoma "is not known to medical science to be caused or aggravated by trauma" (A-44). Also certain is that the ALJ could not have awarded benefits because the "issue of causality remains debateable" after having rejecting respondent's evidence had he concluded that petitioner's doctor's testimony *had been* credible and accurate; in that event the weight of the acceptable credible evidence would have preponderated in Mrs. Santoro's favor. In addition, the reason for ALJ doubt was identified and this required rejection of petitioner's witness' testimony that deceased's astrocytoma had not been cancer; and all but surely because whatever his hearing testimony he had described it as "malignant looking" in his report of operation (11 AM).

What the Administrative Law Judge doubted was not that there *had been* "abrupt escalation of the underlying astrocytoma" which the finder of fact accepted, but both experts' opinion that this could in no way be related to trauma. Despite agreement that trauma did not cause deceased's astrocytoma and did not "make[ ] the tumor bigger or increase[ ] cell growth or anything else. . .", the ALJ observed that "the type of the Claimant's (*sic*) underlying neoplasm poses one of the greatest difficulties in resolving the basic issue in this

case". This "difficulty" arose from the fact that "[i]t seems evident or reasonable to acknowledge that the causes and factors controlling malignancy are still obscure and under research"; and the Administrative Law Judge immediately thereafter observed that although respondent's witness "testified that the disease is not known . . . to be caused or aggravated by trauma", there nonetheless was ". . . nothing in this record to indicate whether any statistical studies have been done in this area" (A-44).

In suggesting that there was "evidentiary deadlock", petitioners fail to acknowledge that the impact of the "true doubt rule" in Longshore Act cases is best demonstrated by the fact that it is improper to base an award, where as in Mrs. Santoro's case the issue does not enable the factfinder to decide upon the common sense of the situation, or when the record is not conclusive on the issue of causation (see, *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741 (5th Cir. 1962)), on adoption of an explanation which expert medical testimony rejects. See, *Gober v. Matthews*, 574 F.2d 772, 777 (3rd Cir. 1978). For these reasons, had the Administrative Law Judge held affirmatively that injury at work *had* caused abrupt escalation in level of malignancy such determination would have required the Benefits Review Board to vacate the award in Mrs. Santoro's favor. Mere confession of doubt as to the accuracy of both experts' rejection of this explanation for "causality" had, however, exactly the opposite effect. Doubt of the correctness of joint testimony was not just sufficient to make "conflicting" testimony "equally probative" it was enough for the Board to conclude that the award of benefits had been based upon "substantial evidence". In addition, the Benefits Review Board established what must be shown upon Longshore Act Section 21 review in order to avoid liability for benefits in a doubt rule case where the Section 20(a) presumption has been rebutted. In his decision and order awarding benefits the ALJ held that "[b]efore Section 20(a) is applicable, a claimant must establish that he or she sustained some harm, and that working conditions existed or that an

accident occurred that *could have* caused the harm " (A-30, emphasis added), an alleged obligation of the benefits claimant mis-characterized by the court of appeals as necessary "to establish a *prima facie* case" (992 F.2d 1279-80). After observing that the Section 20(a) presumption had been successfully invoked and rebutted, the Benefits Review Board affirmed: "Because the employer has failed to establish that the Administrative Law Judge's crediting (*sic*)" of claimant's doctor's opinion "is inherently incredible or patently unreasonable" (A-23). This showing is, of course, *identical* to what would be required—assuming that any evidence is needed for the Section 20(a) presumption to be invoked—in order to *deny* invocation, i.e., that the proof supporting entitlement to benefits was so infirm as to fail to establish even that the harm at issue "could have" been caused by work-related injury. Although neither petitioner says so, this means if the "true doubt rule" is valid, doubt is Longshore Act Section 21 "substantial evidence". Of course, the doubt rule shifts the burden of persuasion and with that the risk of non-persuasion to the Longshore Act employer, but to persuade the factfinder of what? In Mrs. Santoro's case respondent was required to prove beyond doubt there was no *possible* connection between injury and subsequent disability and death. Despite the fact that there is, of course, no rational connection between Longshore Act employment and aggravation of cervical spinal cord cancer (see, *Mobile, J&K.C.R. Co. v. Turnipseed*, 219 U.S. 35 (1910)), respondent was found liable for benefits because the riddle of deceased's cancer has not been solved. As a result, the Section 20(a) presumption was *not rebuttable*. It is to *this* "interpretation" of the Longshore Act to which the government would have this Court "defer". There is no question at all that it is a result which the *actual* "any" and "all" doubt rule permits. Because the Solicitor seeks to have Mrs. Santoro's award restored, it is *this* rule, which allows "selection" of a "set of facts" favoring claimant as the Review Board held in *Greenwich Colleries* (19a, n. 3), which the Agency sponsors.

ARGUMENT

The sole issue raised by the petitions is how facts are to be found at administrative hearings of Longshore and Black Lung Benefits Act claims. Issues of what might be called "substantive" law, of course, also apply. Mrs. Santoro's award offers an example of a finding of fact insufficient to establish entitlement to benefits: that the record "establish[ed] and unbroken claim of events supporting a finding of causally-related neck pain" (A-44). It is not pain but ". . . incapacity because of injury to earn the wages which the employee was earning at the time of injury in the same or other employment" (Section 2(10)) which triggers the obligation to pay benefits in the event that the connection between "disability or death" which ". . . results from an injury" (Section 3(a)) is proven to be an ". . . accidental injury or death arising out of and in the course of employment . . ." (Section 2(2)). It has been, however, held to be enough to establish a right to benefits to show that an employment injury aggravates, accelerates or combines with a pre-existing condition (see, e.g., *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)); and supervening cause is said to bar Longshore Act benefit claims only if having an "overpowering and nullifying effect" (*Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898 (5th Cir. 1981)), examples of how the law has been structured in way favorable to claimants beginning with this Court's decision in *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932). Such "humanitarian" interpretations of the Longshore Act concerning what need be proven as opposed to how all necessary facts must be established are not affected as a result of the court of appeals' decision in Mrs. Santoro's case.

THE ORIGINS AND ERROR OF THE DOUBT RULE

The first "true doubt rule" decision according to the Solicitor is *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932), a case involving issue of "accidental injury" and "arising out of and in the course of employment" in which it was said: "Where there is doubt, it should be resolved in favor of the injured employee or his dependent family"; *and* that "[i]n this case the facts are all agreed". The second is *Southern S.S. Co. v. Norton*, 101 F.2d 825, 827 (3rd Cir. 1939) which involved interpretation of Longshore Act Section (2)(10) "disability", a question characterized by the court of appeals as "one of law" in which the court held that "it was quite apparent from the record" that claimant had proved his entitlement to benefits. In the Solicitor's next doubt rule case, *Southern Pacific Co. v. Sheppeard*, 112 F.2d 147, 148 (5th Cir. 1940), which involved death as a result of assault by a co-worker, the court of appeals held "the evidence is not in dispute". In *F.H. McGraw & Co. v. Lowe*, 145 F.2d 886, 888 (2nd Cir. 1944), the last of the Solicitor's cases prior to APA adoption, which involved Parkinson's disease allegedly caused by trauma, "one expert neurologist gave testimony that such . . . causal relationship existed"; and as a result the court concluded that it could not say that "the deputy commissioner did not base his finding of causal relationship . . . upon the evidence submitted". There is, in fact, *no* case in which any rule of doubt was held applicable to Longshore Act factfinding prior to enactment of the Procedures Act; and the Solicitor's claim that it was "firmly established as a rule of construction under the . . . [Longshore Act] . . . when the APA was enacted" is refuted by the government's authority itself. Omitted from argument in both petitions is citation to cases decided after adoption of the Administrative Procedures Act holding that the Longshore Act claimant had the "burden of proof" in the sense of risk of non-persuasion. See, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Gooding v. Willard*, 209 F.2d 913 (2nd Cir. 1954); *Eschbach v.*

Contractors, Pacific Naval Air Bases, 181 F.2d 860 (7th Cir. 1950).

The first case in which it was held that a doubt rule applies to Longshore Act factfinding is *Young & Company v. Shea*, 397 F.2d 185 (5th Cir. 1968). This holding and every other thereafter contradicts the Longshore Act factfinder's duty of ". . . initially selecting the inference which seems most reasonable . . ." established in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947), a case decided after APA enactment but which involved a benefits claim arising before that time, since the doubt rule allows benefits to be awarded unless the ALJ is certain they should be denied. In addition, the rule, which according to the Benefits Review Board in Mrs. Santoro's case "comes into play" only after the Act Section 20(a) presumption is rebutted (A-21), requires the employer to "insure conviction", i.e., abolish doubt, that benefits are *not* owed. In *DelVecchio v. Bowers*, 296 U.S. 280 (1935), this Court held that the Longshore Act Section 20(d) presumption, "[t]hat the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another", is not evidence; and as a result an employer need not offer proof in rebuttal sufficient to "induce conviction" that the fact presumed is not so, a holding which rejects the same biased result which the doubt rule achieves. In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 at 612 n.5 (1982) "coverage" of the Longshore Act Section 20(a) presumption was said to be "debateable" but also that it "seems fair to assume" that it is "of the same nature as the presumption created by Section 20(d) . . . as construed in *DelVecchio v. Bowers* . . . and the presumption defined in Rule 301 of the Federal Rules of Evidence"; and in order that entitlement to benefits not be mistakenly treated as disability and life insurance, this Court held that Longshore Act Sections 3(a) and 2(2) "work connection" had to be "proved". *Ibid.* at 615 n.10. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-478 (1951), the Court held that the

Procedures Act had been adopted by Congress to discourage "the notion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself", *exactly* what in *Greenwich Collieries* the ALJ did in considering but not deciding whether there was X-ray evidence of pneumoconiosis. Moreover, it is the identical approach which Mrs. Santoro urges by claiming that "the true doubt rule must be seen as a component of the substantial evidence rule" (Pet., p. 7). In addition, the justification for the doubt rule was initially said in *Young & Company v. Shea* to be existing case law; and in denying rehearing the court *en banc* additionally relied for its holding that the Longshore Act factfinding "standard is less" upon the alleged fact that "Congress has indicated an intention to require less", a conclusion for which only "33 U.S.C. Section 901 *et seq.*" was cited (404 F.2d at 1061 n.2).

In *Young & Company v. Shea, supra*, 397 F.2d at 188, the fifth circuit recited the doubt rule as expressed in *Fidelity & Casualty Co. v. Burris, supra*, without citing that case but others, in no one of which doubt was applied to the process of finding facts. It did so despite holding: "Under 33 U.S.C. Section 903(a) the claimant has the burden of proving all that is not presumed under section 920", thus establishing that the "true doubt rule" began not as a reallocation device but as a lessened standard applicable to claimant's proof. Because *Young & Company* involved question of collateral estoppel on account of a jury finding that claimant had sustained no injury, the court observed first that the "standard [of proof] before the jury is the preponderance-of-credible-evidence test" and next that "[a]lthough we cannot ascribe a legal label to the burden before the . . . [Longshore Act factfinder] . . . the statutory policy, *as interpreted by the courts*, indicates that it is a less stringent standard of persuasion" (*Ibid.* emphasis added). The absence, in fact, of a prior case establishing a rule of doubt applicable to finding facts in Longshore Act benefit claims proves that the doubt rule based upon "statu-

tory policy, as interpreted by the courts" was a mistake when originated—no such "policy" had ever before been found to control the process of finding fact.

More importantly, the holding that there is a "less stringent standard of persuasion" contradicts this Court's definition of what constitutes "substantial evidence". In *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, at 652 (5th Cir. 1968) the court of appeals held by quotation from *NLRB v. Columbian Enameling and Stamping Co., supra*, 306 U.S. at 299-300 that substantial evidence ". . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury"; and its excerpt omitted this Court's first definitional phrase: "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established". This preliminary requirement, since "suspicion" is a source of doubt, proves that any rule of doubt had been rejected by this Court not later than nearly thirty years before its invention. In denying joint rehearing of *Watson v. Gulf Stevedore Corp.* and *Young & Co. v. Shea* (404 F.2d 1059) it was observed correctly that in a Longshore Act case ". . . the reviewing court applies the same rule to review the administrative proceedings that an appellate court applies in review of jury verdicts and in this respect . . . the scope of review of jury verdicts and of administrative findings is the same" (404 F.2d at 1061); and the court held, also correctly, that adoption of the Administrative Procedures Act ". . . did not change the scope of judicial review . . ." of Longshore Act factfinding (*Ibid.*). But it also decided that in reviewing the factfinder's decision ". . . the . . . court must take into account that the standard of persuasion is less . . . than it would be in a jury trial on the same issue" and, contradictorily, that "[n]othing said . . . [in *Young & Company v. Shea*] . . . intimates any modification of the substantial evidence rule . . . applied to the question . . . whether the . . . determination [to award benefits] should be accepted on review" (*Id.*).

Obviously, the question what constitutes substantial evidence is a matter of what the party with the burden of persuasion need prove in addition to how he or she may prove it. How all necessary facts must be established was fixed in *NLRB v. Columbian Enameling and Stamping Co.* and it is by evidence sufficient to justify in an ordinary case a civil jury verdict. This means that the trial judge in refusing to direct a verdict at the close of all proof has determined that the jury is entitled to decide the issues by the standard of the preponderance of the credible evidence—which the court thereafter charges must be the basis of its verdict—in favor of the party having the risk of non-persuasion. Since this jury trial test must be applied before the evidence upon which an award of benefits can be found to be "substantial", the proof standard by the preponderance of the credible evidence *must* apply to findings of fact. Creation of a "less stringent standard" applicable to factfinding, one less than the preponderance of the credible evidence although how much less the court of appeals could not say, *inevitably* affects the standard of review as this Court has defined it—if the evidence at the Section 19(d) hearing is less and as a result *would* justify direction of a verdict, i.e., would not, if believed, establish the claim by the preponderance of the evidence, what does the Benefits Review Board or the courts of appeals review for? It cannot be substantial evidence, i.e., proof which depending upon determinations of credibility and accuracy may properly be found to be preponderant, because the claimant need not offer such proof before benefits may be awarded. Review must therefore be only to determine whether evidence which need not have convinced was "inherently incredible or patently unreasonable" which, of course, is what the Board in Mrs. Santoro's case said it was. This means, in turn, that *neither* the ALJ *nor* the reviewing Board or court need determine whether the evidence is ". . . enough to justify, if the trial were to a jury, a refusal to direct a verdict . . ." In Longshore Act factfinding, it is not just the Administrative Procedures Act which is the "polestar which guides our course" to the

conclusion that facts essential to an award of benefits must be found by the preponderance of evidence (992 F.2d at 1285), it is, in addition, this Court's *NLRB v. Columbian Enameling and Stamping Co.* substantial evidence definition.

The doubt rule/substantial evidence contradiction is apparent in subsequent cases in which Longshore Act benefit awards were affirmed when the testimony concerning work connection was only a "possibility" that it "could have" caused the harm for which benefits were sought. *NLRB v. Columbian Enameling and Stamping Co.* would not, of course, allow an award of benefits based upon testimony of a possibility that disability and/or death arose out of and in the course of employment. In any jury trial evidence that is as consistent with a hypothesis that, for example, the defendant is negligent and with one that it is not, is proof which tends to prove neither. *Gunning v. Cooley*, 281 U.S. 90, 95 (1930)[4]. When a number of things may have brought about, again for example, an injury, for some which the defendant is liable and for some which it is not, it is not for the jury to guess in order to find that, for further example, the negligence of the defendant was the real cause. *Patton v. Texas P.R. Co.*, 179 U.S. 658, 663 (1901). This is because a verdict resting on speculation or conjecture cannot stand. *New York C.R. Co. v. Ambrose*, 280 U.S. 486, 490, 491 (1930). For this reason, in *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) the Section 20(a) presumption, which exists "in the absence of substantial evidence to the contrary", was held not to have been rebutted on account of the fact that the employer's proof was *not* substantial evidence because its medical expert "did *not* testify in any way as to . . . probability". The doubt rule "less stringent standard", however, allows speculation to support an award: It is sufficient if "it . . . [is] . . . possible" that working conditions were enough to "contribute" to the cause in fact of disability. See, *Noble Drilling Co. v. Drake*,

[4] Cited in *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. at 300.

supra, 795 F.2d at 480, in which that court affirmed a benefits award based upon doubt although it *acknowledged* it was ". . . satisfied that the claimant did not establish causation by preponderance of the evidence". Since proof of a possibility is not "substantial evidence", although the Fifth Circuit Court of Appeals insists that the fact finding and review standards are different, its undefined "less stringent standard" ensures that there is no standard of factfinding and, hence, of review.

Mrs. Santoro's case shows that it was the Section 20(a) presumption which was the basis of the benefits award despite the court of appeals' holding that ". . . the ALJ did not make use of the presumption in this case" (992 F.2d at 1280 n.2) and that effort to justify the doubt rule, as *Noble Drilling Co. v. Drake* also reflects, requires treating the presumption as the claimant's *prima facie* case. This demonstrates that the courts of appeals and the Benefits Review Board in applying the doubt rule mistake what a Longshore Act claimant need prove as well as how he or she need prove it. It has been said that a *prima facie* case ". . . consists of sufficient evidence *in that type of case* to get plaintiff past a motion for a directed verdict in a jury case" and: "It is the evidence necessary to require a defendant to proceed with his case". *White v. Abrams*, 495 F.2d 724, 729 (9th Cir. 1974). These definitions are not, however, equivalent when a presumption is involved. Assuming evidence is necessary to invoke the Section 20(a) presumption and that this need be only that work connection is possible, that evidence, once the presumption is rebutted, must fall out of the case if the presumption itself does. Moreover, it is because of the presumption's existence and *not* on account of the fact that claimant has presented "sufficient evidence *in that type of case* [i.e., a claim for benefits pursuant to the Act's Section 3(a) and 2(2)] to get . . . [claimant] . . . past a motion for a directed verdict in a jury case" that the employer must proceed, unless proof triggering the presumption is not just evidence after rebuttal it satisfies the substantive law requirement of what need be proved. In Mrs.

Santoro's case, this was whether her late husband's injury at work had, *in fact*, contributed to his subsequent disability and death, not that this was *possible*. Nonetheless, the court of appeals held that a Longshore Act *prima facie* case requires proof sufficient to invoke the presumption, failure of which "defeats the claim" (992 F.2d at 1279), although mere filing of claim may invoke it. In *DelVecchio v. Bowers*, *supra*, 296 U.S. at 286 this Court held that the "only office" of Section 20(d) presumption was to "control the result where there is an entire lack of competent evidence"; that "[i]t never had and cannot acquire the attribute of evidence in the claimant's favor"; and "[o]nce the employer has carried his burden of offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case". Since in Mrs. Santoro's case it was said by the Benefits Review Board that it was after the Longshore Act Section 20(a) presumption was invoked and rebutted that the "true doubt rule comes into play" (A-21), the rule requires that proof in opposition to an award of benefits "induce conviction" that benefits are not owed, exactly the view that "presumptions are evidence" rejected in *DelVecchio v. Bowers*. Since *DelVecchio v. Bowers*, held that "substantial evidence" as used in Longshore Act Section 20 need only be "sufficient to justify a contrary conclusion" and *U.S. Industries/Federal Sheet Metals, Inc.*, *supra*, holds that the work connection has to be "proved", it is not possible to read either case as other than *rejecting* the "true doubt rule". In Mrs. Santoro's case doubt nonetheless substituted for her witness' "edema theory"; and evidence said to have triggered the presumption was *not*, in fact, the basis of the award. For this reason had the presumption truly "fallen out" Mrs. Santoro would have been denied benefits. The Administrative Law Judge, in fact, rejected claim that her husband's disability and death "could have" been caused *for the reason asserted*. In *U.S. Industries/Federal Sheet Metals, Inc.* this Court held that the Longshore Act Section 20(a) presumption does not apply to claims not made, and not only did Mrs. Santoro not claim her husband's disease was caused to

increase in level of malignancy by reason of injury, she denied it. More importantly, mistaking the presumption for a "*prima facie* case" and evidence triggering it for proof sufficient to establish entitlement to benefits, together with a rule of doubt thereafter applicable, means that the presumption *always* controls the result, not "in absence of any proof" or when the proof is in "equipoise", but despite whatever proof if offered by a Longshore Act employer.

Of course, how proof, if any is required, sufficient to invoke the Section 20(a) presumption became confused with what a Longshore Act claimant need prove can be adequately explained only by the enduring character of the mistaken view that presumptions are evidence[5]. The true doubt rule has been said to ". . . ensure that the employer will win . . . only when its evidence is *stronger* than the claimant's" (*Mullins Coal Co. v. Director, OWCP*, *supra*, 484 U.S. at 144 n.12, precisely what a presumption which is justified by a rational connection can be made to achieve, but which this Court has held the Section 20(d) presumption does not. Surely, were there an intended bias in Longshore Act factfinding Congress would not have provided "in the absence of substantial evidence to the contrary" in Section 20. Instead, it would have required more. Of course, that presumptions are or ought to be evidence, i.e., should influence the result after rebuttal, is a mistake of ancient lineage. See, Weinstein's *Evidence* (Vol. 1, Rules 101-403, Section 300[01] pp. 300-1 to 5 (1989). This view of the effect of presumptions was, however, rejected by Congress in enacting the Federal Rules of Evidence (Pub. L. 93-595, January 2, 1975, 88 Stat. 1931). *Ibid*, Section 301[01] pp. 301-1 to 12, 37.

---

[5] Assisted by the practice of treating Benefits Review Board decisions as authority. See, *Noble Drilling v. Drake*, *supra*, 795 F.2d at 481. In U.S. Industries/Federal Sheet Metal, Inc. (455 U.S. at 615-16) this Court held that the presumption refers to "[a] prima facie 'claim for compensation' " and that it is "no substitute for the allegations necessary to state a prima facie case."

In *Noble Drilling Co. v. Drake*, *supra*, the Court held that the doubt rule is properly based upon ". . . broad general principles . . ." (795 F.2d at 482) but it nonetheless *must be* based upon some Longshore Act provision. The starting point in construing a statute is the language of the statute itself. *Consumer Products Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); and the same word or phrase used in a statute more than once ordinarily should be given the same meaning. See, e.g., *Barnson v. U.S.*, 816 F.2d 549, 554 (10th Cir. 1987). Legislative "purpose" no less than legislative history divorced from statutory text is meaningless. *Lincoln v. Virgil*, ____ U.S. ____, 113 S.Ct. 2024, 2031-32 (1993). If substantial evidence has the same meaning in both Sections 20 and 21 proper construction requires that the Longshore Act be found to contain no bias in favor of finding facts supporting compensability. As this Court has held by rejecting the view that evidence rebutting a Section 20 presumption need "induce conviction" and, instead, deciding that it need only justify a contrary conclusion, and defining substantial evidence sufficient to support an award of benefits upon review in exactly the same terms, the "true doubt rule" contradicts Longshore Act Sections 20 and 21. Of course, since agency right to allocate achieves the same result rejected in *DelVecchio v. Bowers*, the government's claim of deference means that the Secretary of Labor may overrule the Supreme Court of the United States.

CONCLUSION

How despite massive Supreme Court precedent abolishing all possibility of a doubt rule applicable in administrative hearings it can be said that this Court, in *Mullins Coal v. Director, OWCP*, *supra*, "ducked" this only alleged issue (see, *Freeman United Coal Mining Co. v. Director, OWCP*, 999 F.2d 291, 293 (7th Cir. 1993, statement of Esterbrook, J.) is impossible to understand. In *Mullins Coal*, this Court

observed that the doubt rule meant "stronger employer evidence was required "on invocation and rebuttal" (484 U.S. 144 n.12). It rejected use of the rule on invocation and had no reason to decide whether it applied to rebuttal since mooted by Black Lung Act regulation, the effect of which putting the burden of persuasion on the employer not being disputed. Of course, since the rule applies to "all" doubts on "an" issue, to reject it once is to reject it *always*. It is, thus, awkward, surely, for members of that court to express the view that this Court must now "supply the cure" for an ailment which the courts of appeals created. Nonetheless, every consideration important to determining whether a writ of certiorari should issue exists in *Maher Terminals, Inc. v. Director, OWCP*, despite the fact that the decision of the Third Circuit Court of Appeals is correct. The retreat from the requirement of reasoned analysis which the "true doubt rule" reflects demonstrates that what is at risk is not less than the adversarial system of fact finding. An important justification for it seems to be concern for administrative economy, despite the fact that under both the Longshore and Black Lung Act claim frequently could not be more effectively promoted than by making a doubt rule applicable to the fact finding process. What this inappropriate argument also establishes is how unfair the rule is, especially to Longshore Act employers. In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 261 n.9 (1979) this Court held that Congress in amending the Longshore Act in 1972 "made a determined effort to narrow the gap" between benefits and damages. The District of Columbia rejected the amended Act as its compensation statute because its expense made business in the District "non-competitive". *Hughes v. Dist. of Col. Greater Wash. Labor Council*, 498 A.2d 567, 569-70 (D.C. 1985). This Court has held that the 1972 Longshore Act amendments[6], since the result of compromise, are *not* remedial. *Morrison-Knudsen Const. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983). As

[6] Pub. L. 92-576, October 27, 1972, 86 Stat. 1251.

of the time of filing of this Brief respondent will have paid compensation benefits amounting to $326,858 as a result of Mrs. Santoro's claim, no part of which is recoverable from her in the event respondent should ultimately prevail. See, Longshore Act section 21(b)(3) and (c).

DATED: New York, New York
December 10, 1993

Respectfully submitted,
JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
Attorneys for Respondent/
Cross-Petitioner
26 Broadway
New York, New York 10004-1882
(212) 422-6111

APPENDIX

DIRECT TESTIMONY OF DR. YAZDAN
(Hearing Transcript, pages 50-51)

A (Continued):

So he had a mixture of symptoms which were all precipitated one way or another by this accident.

Now, we are not saying that it was caused by the accident, so that's where the controversy is. You know, people think when somebody is saying about their spondylosis or the astrocytoma was caused by trauma. Well, that's not true. We know that's not true. Trauma does not cause neoplasm, any kind of neoplasm, we know that.

(pause)

Trauma, on one shot deal doesn't even cause a spondylosis. Although in multiple trauma and grinding does cause that.

However, go back in—go back to astrocytoma. This tumor or this lesion initially was dormant there and he might have gone another 15 or 20 years before he would become symptomatic.

(pause)

But this injury expedited the whole situation.

Q In other words, doctor, if I understand you correctly, the injury did not cause the tumor to grow.

A No.

Q It did cause edema, apparently.

A Yes, yes.

(pause)

Q And it was the edema within the limited opening.

A Yeah.

Q What do you call that, parameter, doctor?

A Limited opening, yeah, a space, yeah.

Q Limited space, which caused the symptomatology. Now what symptomatology are we talking about?

A We're talking about the second group of symptomatology which leads to the partial paralysis, sensory deficit and those things involving the extremities.

Neck pain and other things that he had, that was related to the—that was a direct result of the sprain and a strain of every past injury that he had.

(pause)

De—development of the paralysis was the result of the gradual swelling around the tumor within the cord.

* * *

Q I'm sorry. Was that the cause, doctor, of the paralysis to the left side of the body followed by the right side of the body?

A That's correct.

CROSS-EXAMINATION OF DR. YAZDAN
(Hearing Transcript, pages 133-34)

Q Now, that edema caused, according to you, pressure on the cord which was translated into neurological-type complaints and in the findings.

A Now you're introducing the spinal cord.

In order for you to understand that, you have got to imagine or visualize the anatomy of the neck of this particular patient, not any patient. This particular patient's cord was already slightly bigger. Listen to this.

His cord, diameter, was a slightly bigger than an ordinary individual without a tumor.

In other words, the space between this bony canal and the cord was diminished already. Therefore, even a minor sprain may put this guy in trouble because there is not enough room in there for the cord to maneuver.

Therefore, as an immediate reaction, you get the muscular response. Delayed reaction, because the patient keeps moving the neck in the subsequent several weeks, you will get further, further trauma, more and more trauma to the cord and which eventually leads to further edema within the cord.

No, none of these things makes the tumor bigger or increases their cell growth or anything else, or create a tumor.

But yes, trauma does create edema at different time at different level depending how the patient, where the edema is, what tissue is involved and how the patient is treating it. If it's not diagnosed, the patient keeps moving constantly, he keeps—

Q And that's—

A—traumatizing it, therefore, it's going to get worse, you see?

* * *

Q Doctor, in fact, you're saying something quite different, are you not? You're saying now that the sprain caused, even though it may have been slight, direct mechanical contact

between the bony canal and the tissue comprising the spinal cord.

A It's not different. I mentioned it, maybe in different—

Q You're talking—

A—terms, but—

Q You're talking about something that, according to your theory just now expressed—

* * *

HEARING TRANSCRIPT
(Pages 142-144)

Q The incident caused something to happen here on the shoulders or—or the neck or altogether.

A Both, both.

* * *

Q That did what?

A That did cause several things.

Number one, it causes permanent strain of the muscles.

Q All right.

A Number two, it causes swelling around the spine itself with the ligaments, which—which is arthritic and that causes severe pain.

Number three, began to rub against the cord or the dura, which is covering the cord.

Q Right.

A And in the beginning, this was not apparently enough to cause immediate neurological picture, but it just caused pain. But with the frequent trauma day after day after day, he gradually got worse and worse and worse and worse, until he wound up in the emergency room.

Nobody could explain how a simple cervical sprain could lift—could lead to this kind of a picture. Until we found out what happened, then we tried to put everything together and that's what I'm trying to do, put them together.

* * *

Q You're saying that there was mechanical contact between the cord or cord tissue and the dura—

A And the spinal canal.

Q —and the spinal canal—

A Yes.

Q —with the result of the development within the canal of edema.

A Edema around the tumor because you had a dormant tumor there which was silent. When you have a silent problem

where there is osteoarthritis or whether it's a tumor or whether it's a cyst, whatever; that area, the tissue surrounding the lesions more suspectable of developing edema than the rest of the body.

The trauma of this magnitude, which was not very severe, is not enough to cause a swelling in the cord and myelopathy.

However, if you have some pre-existing condition in the cord, then you have this trauma on top of it, yes; if it leads to a trauma on a crescendo fashion.

(pause)

(Transcript page 166)

Q Doctor.

A Yes.

Q The mechanics, according to this now-expressed explanation is again swelling, it's swelling within the cord.

A Yes.

Q Is that what you're saying?

A Around the lesion, which happened—which turned out to be astrocytoma.

Q Now, are you saying that—

A But it happened in—

Q —that swelling around the cord, this edema around—within the cord, within the cord itself—

A Yes.

Q —around the tumor—

A Yes.

Q —that that was the result of these consecutive traumas, beginning with the sprain of the neck on July 23rd, 1985?

(No response)

And following that—

A It's—

Q —in the course of ordinary use of the head and neck?

A Yes, yes.

* * *

Q You're saying that the rub, rub, rub of—

A The spinal cord.

Q —cord tissue—

A Yes.

Q —yes, the bony canal, in the period of time between July 23rd, 1985 and for example August 7th, 1985 caused swelling within the cord around the tumor which in turn caused the appearance of symptoms and signs of neurological dysfunction.

A That's right.

* * *

(at page 171)

Q Have a little patience with me doctor.

In fact, that this cancer—

A All right.

Q —this tragic cancer, this incurable cancer simply overtook—tragically overtook Michael—Michael Santoro?

(pause)

A I think that—

Q Is that a valid alternative—

A —no, no, No. it's not valid, no, no.

Q —explanation of the whole picture?

A No, it's not valid for the following reason:

Number one, you cannot refer to astrocytoma as cancer. For the following reason: cancer, in general, means anaplastic tissue in the body which spreads and kills the patient.

Astrocytomas of the brain and the spinal cord do not spread, the grow in situ, in place.

* * *

(At page 191)

(Answer continued)—that this gentleman had this tumor the same size, practically, before this accident and he wasn't symptomatic. How do you explain that?

Q A tumor of this kind, if the man is fortunate enough to live long enough and depending on how aggressive it is and it can be anything from weeks to months to years will at some point in time—

A Yes, at some point in time, will get—

Q —in—in God's due time, cause symptoms, is that not so?

A Eventually, yes.

(pause)

Q You say—

A Oh no, me? I never said that.

Q You say that that tumor, this tumor described by you in your operative report on August 19th, as it's been described

in this record, would've co-existed for 15 to 20 years without causing symptoms but for the fact that some alleged sprain of the neck occurred July 23rd, 1985.

(pause)

That's your testimony, isn't it, sir?

A Yes.

10 AM

TESTIMONY OF DR. DERBY
(Hearing Transcript page 257)

Q Now, doctor, what is astrocytoma?

A An astrocyte is a type of cell in the central nervous system which serves as support and maintenance to the other cells which do the business. Those are the neurons and the neurons have long fibers coming out from them that run to wherever they're going to go and in the central nervous system the astrocytes provide some structure, so this whole complex of neurons and white matter and also nourish the cells and the fibers.

* * *

(at page 258)

Q Is astrocytoma curable?

A No. We manage it but we cannot cure it.

Q Is it a form of cancer?

A Yes, in lay terms it is cancer.

* * *

(at page 259)

Q Now the operative report first, doctor, would you tell us what of significance to you is reflected in the report of the operation.

A That this was a highly malignant astrocytoma centering on the third and fourth cervical segments but in fact in totality extending as high as the upper end of the laminectomy at the base of the skull and extending as low down as the lower end of the laminectomy at C-7, meaning that this tumor ran from the upper most spinal cord with its connection to the medulla, down through the entire cervical segments, all eight of them and into the upper thoracic cord.

The character of the tumor at its central portion described by Dr. Yazdan as a mushroom consisted of a thin out, fluctuant, soft area which was not a cyst and this was by definition a necrotic area. Necrosis which is tissue death was occurring within the tumor itself and this is a categoric finding in the most malignant, the most aggressive kind of astrocytoma.

11 AM

REPORT OF OPERATION

NAME SANTORO, MICHAEL

SURGEON(S) DR. YAZDAN

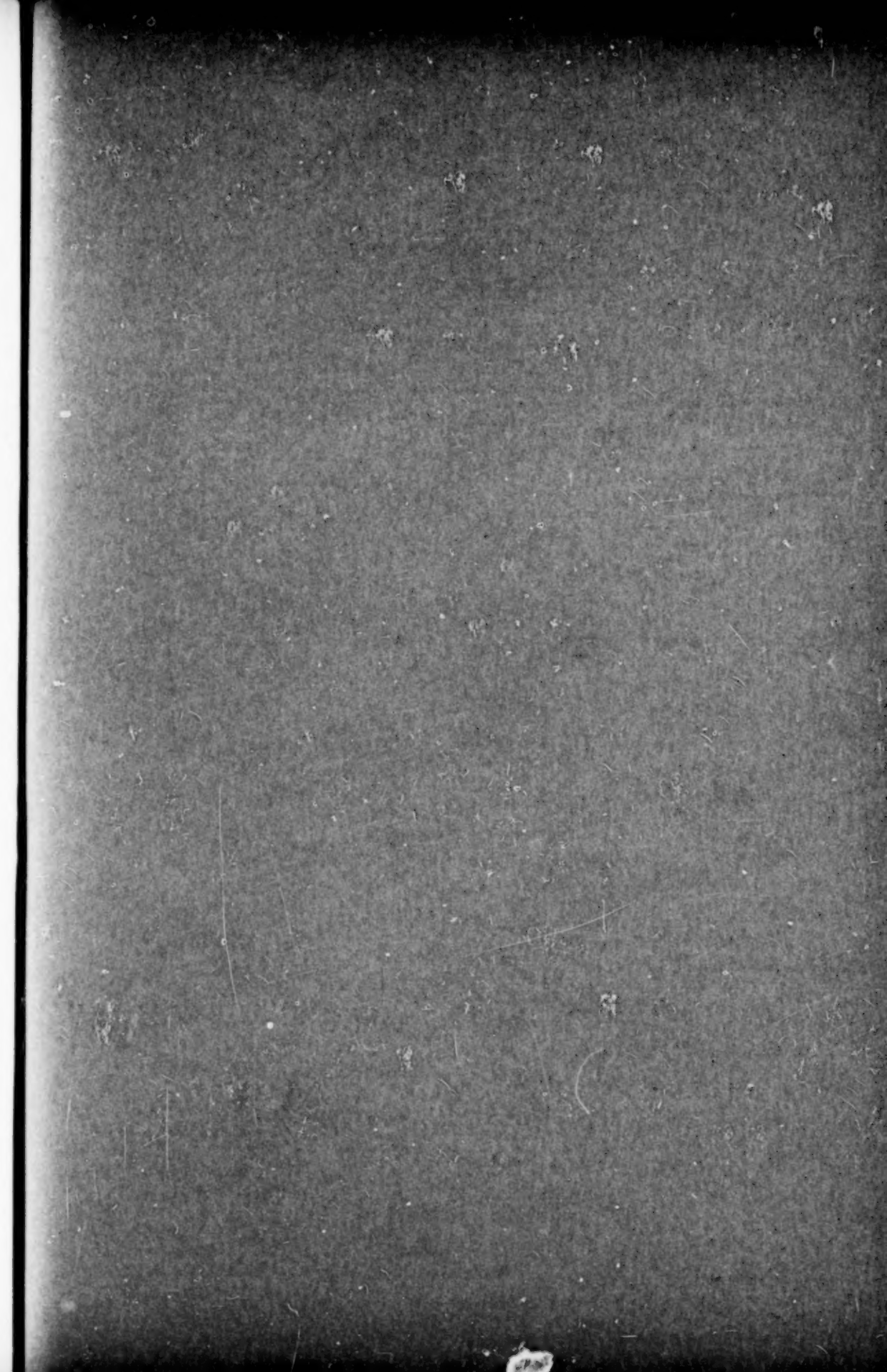
* * *

PREOPERATIVE DIAGNOSIS	QUADRIPLEGIA SECONDARY TO CERVICAL MYELOPATHY SECONDARY TO INTERMEDULLARY (sic) LESION.
POSTOPERATIVE DIAGNOSIS	INTERMEDULLARY LESION OCCUPYING SEVERAL SEGMENTS OF THE SPINAL CORD PREDOMINATELY AT C3-C4 WHICH APPEARED TO BE MALIGNANT LOOKING.
NAME OF OPERATION	DIFFUSE WIDE CERVICAL LAMINECTOMY. INTRADURAL EXPLORATION. MITRAL DISSECTION OF THE TUMOR AND PARTIAL RESECTION.

PROCEDURE: The patient was taken to the Operating Room on 8/19/85 where under satisfactory general endotracheal anesthesia, he was placed in prone laminectomy position leaning on two chest rolls and the head resting on a horseshoe cerebellar head rest . . . Following completed hemostasis, laminectomy was started from C2 to T1, and following unroofing of the canal, the laminectomy itself was widened to the articular facet region. It was readily noted that the dura was somewhat wider than (sic) C3-C4 area . . . Exploration was started with 6 power magnification which readily identified the area and the extramedullary portion of the intradural space was negative throughout except for spondylotic changes which were readily noticeable with a protrusion of most disc spaces. However, the prominent feature of the area was the mushroom deformity from back part of the cord to C3

and C4 which had totally destroyed normal anatomical feature of the spinal cord and the cord was extremely wide in this region. The top of the mushroom areas were quite thin and fluctuant . . . Further exploration showed that the tumor was extending deep in the cord and was extending upward more than downward. Further removal of tumor was done and initial frozen section report was inconclusive. However, several more pieces were sent and it was evident that even under 10 power magnification, that there was no line of demarcation between this lesion and, the tumor and the cord. Therefore the operation was terminated . . . .

/s/ _____
DAVID YAZDAN, M.D.
mc
D 8/21/85 T 8/21/85



FILED
NOV 21 1993
OFFICE OF THE CLERK

No. 93-744 (3)

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT GREENWICH COLLIERIES IN OPPOSITION

JOHN J. BAGNATO
Counsel of Record
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, Pennsylvania 15907
(814) 536-0735

MARK E. SOLOMONS
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400K
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-7100

BEST AVAILABLE COPY

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31 pp

QUESTIONS PRESENTED

1. Does section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), authorize the U.S. Department of Labor's administrative law judges ("ALJ") to find facts in favor of certain classes of parties, based solely upon the identity of the party, even if the fact is not, in the ALJ's opinion, supported by the weight of the evidence, *i.e.*, a preponderance, but the evidence pro and con is roughly equal?

2. If section 7(c) of the Administrative Procedure Act compels an ALJ to find only facts that are supported by the weight of the evidence, has Congress expressly superseded the requirements of section 7(c) in the Black Lung Benefits Act and the Longshore and Harbor-workers' Compensation Act, in compliance with the rule against supersedure contained in section 12 of the Administrative Procedure Act, 5 U.S.C. § 559?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Andrew Ondecko ("Ondecko") is a claimant for benefits under the Black Lung Benefits Act. Petitioner below and now Respondent, Greenwich Collieries, is a wholly owned subsidiary of the Pennsylvania Mines Corporation. The Petitioner, Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the Black Lung Program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
ARGUMENT	9
I. THE CIRCUITS AND THE AGENCY DISAGREE	9
II. THE THIRD CIRCUIT'S DECISION IN *MAHER* IS CORRECT	13
III. THIS IS AN IMPORTANT CASE	21
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Director, Office of Workers' Compensation Programs, 886 F.2d 818 (6th Cir. 1989) 4

Addington v. Texas, 441 U.S. 418 (1979) 8

Ardestani v. INS, 112 S. Ct. 515 (1991) 11

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1991) 17

Brownell v. We Shun, 352 U.S. 180 (1956) 19

Campbell v. Director, Office of Workers' Compensation Programs, 846 F.2d 502 (8th Cir. 1988) 4

Compton v. Inland Steel Co., 933 F.2d 477 (7th Cir. 1991) 3

Del Vecchio v. Bowers, 296 U.S. 280 (1935) 16, 17

Director, Office of Workers' Compensation Programs v. Alabama By-Products Co., 560 F.2d 710 (5th Cir. 1977) 11

Director, Office of Workers' Compensation Programs v. Peabody Coal Company, 554 F.2d 310 (7th Cir. 1977) 11

Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992) 17

Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993) 4, 9, 10, 12, 14

Grizzle v. Pickands Mather & Co., 994 F.2d 1093 (4th Cir. 1993) 9

Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs, 997 F.2d 1277 (3d Cir. 1993) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Marcello v. Bonds, 349 U.S. 302 (1958) 19

Morrison-Knudtsen Constr. Co. v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983) 17

Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987) 2, 3, 9, 10, 14

NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804 (4th Cir. 1975) 18

NLRB v. Transportation Management Corp., 462 U.S. 383 (1983) 10, 11, 12, 19, 20

Pennsylvania R. Co. v. Chamberlain, 288 U.S. 33 (1933) 18

Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983) 17

Professional Reactor Operator Society v. U.S. Nuclear Regulatory Commission, 939 F.2d 1047 (D.C. Cir. 1991) 11, 19

Provance v. United States Steel Corp., 1 Black Lung Rep. (MB) 1-483 (Ben. Rev. Bd. 1978) 16

Robinson v. Pickands Mather & Co., 914 F.2d 35 (4th Cir. 1990) 3

Santosky v. Kramer, 455 U.S. 745 (1982) 8

Skukan v. Consolidation Coal Co., 993 F.2d 1228 (6th Cir. 1993) 9, 10, 12

Southern Pac. Co. v. Sheppard, 112 F.2d 147 (5th Cir. 1940) 16

Southern S.S. Co. v. Norton, 101 F.2d 825 (3d Cir. 1939) 16

TABLE OF AUTHORITIES – Continued

Page

Steadman v. SEC, 450 U.S. 91 (1981) ..... *passim*

Trent Coal Co. v. Day, 739 F.2d 116 (3d Cir. 1984) 11

U.S. Industries v. Director, Office of Workers' Compensation Programs, 455 U.S. 608 (1976) 16

U.S. Pipe & Foundry Co. v. Webb, 595 F.2d 264 (5th Cir. 1979) 11

STATUTES AND REGULATIONS:

Administrative Procedure Act, as amended, 5 U.S.C. §§ 551-559, 701-706 (1988) 1

Section 4(b), 5 U.S.C. § 551(10)(E) (1988) 18

Section 7(c), 5 U.S.C. § 556(d) (1988) 2

Section 12, 5 U.S.C. § 559 (1988) 8, 13, 19, 21

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988) 2

Section 422(a), 30 U.S.C. § 932(a) (1988) 6

Section 422(k), 30 U.S.C. § 932(k) (1988) ii

Longshore Act, as amended, 33 U.S.C. §§ 901-952 (1988) 6

Section 19(d), 33 U.S.C. § 919(d) (1988) 7, 18

Section 20(a), 33 U.S.C. § 920(a) (1988) 16

38 U.S.C. § 5107(b) (1988) 13

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, as amended 2

TABLE OF AUTHORITIES – Continued

Page

Longshore and Harbor Workers' Compensation Act, Pub. L. No. 92-576, 86 Stat. 1261 (1972) 16

Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) 2

Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978) 2

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) 2

Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981) 2, 3

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 312, 313 (1986) 2

Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) 2

Black Lung Program Regulations 20 C.F.R. Part 718 (1993) 5

20 C.F.R. § 718.3 (1993) 13

20 C.F.R. § 718.403 (1993) 13

20 C.F.R. Part 727 (1993) 13

MISCELLANEOUS:

Sen. Comm. on the Judiciary, 79th Cong., 2d Sess., *Legislative History, Administrative Procedure Act* (1946) 7, 8, 19, 20

S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 14, 15

S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 14

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 248, 79th Cong., 2d Sess. (1946) 7

H.R. Rep. No. 1980, 79th Cong., 1st Sess. (1945) 18

92 Cong. Rec. 2148 (1946) 8

92 Cong. Rec. 2159 (1946) 8

Attorney General's Manual on the Administrative Procedure Act (1947) 19

3A Larson, *The Law of Workmen's Compensation* (1976) 16

Verkuil, *et al., Administrative Conference of the United States, The Federal Administrative Judiciary* (1992) 21

Brief for Federal Respondent, *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987) (No. 86-327) 3

No. 93-744

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT GREENWICH COLLIERIES IN OPPOSITION

Respondent Greenwich Collieries respectfully opposes the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit. Greenwich acknowledges, however, that disagreements among several courts of appeals over the meaning of key provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, governing on-the-record adjudications before dozens of federal boards and agencies warrant the attention of this Court.

STATEMENT OF THE CASE

A. In 1987, this Court held that a claimant for benefits under the Black Lung Benefits Act,[1] may utilize a very powerful presumption called the "interim presumption" if the claimant establishes a fact that invokes the presumption by a preponderance of the evidence. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 159 (1987). In petitioning the case to this Court, the Mullins Coal Company argued that the application of a preponderance standard is compelled by the plain language of the regulation, as well as by section 7(c) of the Administrative Procedure Act ("APA"). 5 U.S.C. § 556(d). The APA argument was based, in part, on this Court's decision in *Steadman v. SEC*, 450 U.S. 91 (1981). In *Mullins*, this Court agreed that the plain language of the regulation establishing the interim presumption embodied a traditional preponderance-of-the-evidence standard of proof, and did not, for this reason, reach the APA question. *Mullins Coal*, 484 U.S. at 161 n.35.

In briefing this question, the Department of Labor ("DOL") agreed that section 7(c) applied in black lung

[1] Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, and as further amended by the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981, 95 Stat. 1635, Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 312, 313 (1986), Omnibus Budget Reconciliation Act of 1987, 101 Stat. 1330 (1987) (hereinafter referred to as the "BLBA").

claims, but noted that it was applied "as modified by a 'true doubt' rule." Brief for the Federal Respondent at 34, *Mullins Coal*, 484 U.S. 135 (No. 86-327). Under the true doubt rule, "close calls go to the claimant." *Id.* at 33. This Court noted DOL's advocacy of a true doubt rule, but did not expressly approve or disapprove the rule. *Mullins Coal*, 484 U.S. at 144 n.12.[2] As dissenting Justice Marshall suggested, the rule was not frequently used. *See id.* 484 U.S. at 163 n.2 (Marshall J. dissenting). This was true while the interim presumption and other very generous statutory presumptions and rules of proof applied.

In 1980, DOL repealed the interim presumption for new claims, having been instructed to do so by Congress in 1978. In 1981, after concluding that the black lung program was excessively generous and had outstripped reasonable attempts at benefit funding as a result of over-inclusive benefit criteria, Congress repealed many of the Act's statutory presumptions and rules of proof designed to give claimants a special advantage in adjudications. Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635, §§ 201-04 (1981). *See Compton v. Inland Steel Co.*, 933 F.2d 477, 484-90 (7th Cir. 1991) (Coffey J. concurring). Under the new law, most claimants are required to prove their eligibility by competent evidence. *See e.g., Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990);

[2] It may be argued that the rule was expressly disapproved in the Court's adoption of a preponderance standard.

Adams v. Director, Office of Workers' Compensation Programs, 886 F.2d 818, 820 (6th Cir. 1989); *Campbell v. Director, Office of Workers' Compensation Programs*, 846 F.2d 502, 503 (8th Cir. 1988).

By the late 1980s, some ALJs often employed the true doubt rule to resolve evidentiary conflicts or merely to excuse themselves from conducting a careful review of the evidence. Use of the rule is not compelled by the Act, any regulation or judicial decision and ALJs treat it as an optional decisional device. The Department of Labor's Benefits Review Board, which conducts the appellate review of ALJs' decisions, has not held that an ALJ must employ the true doubt rule and generally allows ALJs to use the true doubt rule or the preponderance standard at the ALJs' election. Because the rule has no concrete source and its jurisprudence is ad hoc, the applicability of the rule in any case has always been unpredictable, depending more on the identity of the ALJ than on the characteristics of the proof in the record.

As the rule was applied more frequently following repeal of statutory proof enhancements, challenges to the validity of the rule increased. The rule is not the product of congressional deliberation or even the give and take of the regulatory process. For claim defendants, it seemed that the rule was employed solely for the purpose of rejecting otherwise persuasive, if not compelling, evidence. It is self-evident that a claimant who proves his or her case by evidence has no need for a true doubt rule. Judge Easterbrook is correct in observing that the rule's purpose seems to be to "re-create" the repealed presumptions and rules possibly "overriding the contrary judgment of Congress." *Freeman United Coal Mining Co. v.*

Office of Workers' Compensation Programs, 999 F.2d 291, 293 (7th Cir. 1993) (statement of Easterbrook J. respecting the suggestion for reh. en banc).

B. Andrew Ondecko filed a claim for black lung benefits on January 31, 1989. The claim was properly adjudicated under DOL's permanent eligibility rules adopted following repeal of the interim presumption. 20 C.F.R. Part 718 (1993). DOL administratively denied the claim and a hearing before an ALJ was requested. On August 3, 1990, ALJ Joan Huddy Rosenzweig awarded benefits. The ALJ found that Ondecko suffered from pneumoconiosis by applying true doubt to a factual record containing one qualified physician's opinion that Ondecko's x-rays showed pneumoconiosis and the opinions of eight qualified readers that the chest x-rays were negative for the disease. App. 41a. The ALJ also determined that Ondecko was totally disabled due to the disease by applying true doubt to a record containing a family doctor's opinion that Ondecko was so disabled and the opinions of four highly qualified specialists to the contrary. App. 44a. Greenwich appealed to the Benefits Review Board and there argued that the true doubt rule was inappropriately applied because the proof was not equal[3] and that the rule was, also, an unauthorized

---

[3] Greenwich continues in its belief that the evidence in this case is far from equal, and that the ALJ's finding to the contrary is not supported by substantial evidence or an accurate, reasoned review of the record. The true doubt rule is so offensive to claim defendants because it is most often used in this fashion and not to address irreconcilable evidence. Greenwich expressly preserves its right to further challenge the ALJ's weighing of the evidence.

supersedure of the APA-mandated preponderance-of-the-evidence standard. The Board affirmed, holding that the rule is valid and that the Board would not disturb the ALJ's weighing of the evidence. App. 20a, 21a.

The United States Court of Appeals for the Third Circuit reversed. App. 2a. The Court found that DOL's regulations assigning to claimants the burden of "proving" facts alleged, coupled with section 7(c) of the APA foreclose a result in which employers are assigned the burden of disproving entitlement facts in a black lung claim. In construing section 7(c), the Third Circuit relies on this Court's holding in *Steadman v. SEC*, 450 U.S. 91, interpreting the third sentence in section 7(c) to prohibit an ALJ from finding a fact unless the finding is supported by a preponderance of the reliable and probative evidence in the record. App. 12a-13a.

The Third Circuit observes that the true doubt rule impermissibly excuses the claimant from proving the facts needed to support an award. The award made by the ALJ was, therefore, vacated and the case was remanded for a determination of whether the evidence supporting an award preponderated. App. 16a. Rehearing was denied, en banc. App. 48a.

C. The Black Lung Act contains no procedures of its own for the adjudication of claims filed with DOL. For this purpose, the Black Lung Act incorporates by reference the adjudicatory provisions of the Longshore and Harborworkers' Compensation Act. 33 U.S.C. §§ 901-952 ("LHWCA"), *incorporated in parts by reference into* 30 U.S.C. § 932(a). The LHWCA provides: "Notwithstanding any other provisions of this chapter, any hearing held

under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5." 33 U.S.C. § 919(d).

On the same day that Ondecko's case was argued to the Third Circuit, the panel also heard argument in a Longshore claim filed on behalf of Michael Santoro. Here too, the ALJ resolved conflicts in the evidence by application of the true doubt rule, and the Third Circuit vacated and remanded for a review of the record under a preponderance standard. The Third Circuit's decision in Santoro's case differs from its decision in *Ondecko* in its complete reliance on section 7(c), and in particular on the third sentence of that paragraph. *Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs*, 997 F.2d 1277, 1282-85 (3d Cir. 1993). DOL also has asked this Court to review the decision in *Maher*.

Greenwich Collieries believes that the analysis in *Maher* is correct, and that the Third Circuit's partial reliance in *Ondecko* on DOL's regulations purporting to assign a burden of persuasion to claimants in the traditional way, is unnecessary. When the framers of the APA set out to adopt uniform standards for administrative adjudication, an important purpose was to control the way agencies evaluated proof and reached findings of fact. *See* Sen. Comm. on the Judiciary, *Legislative History, the Administrative Procedure Act*, 79th Cong., 2d Sess. 185, 208, 210, 321, 365 (1946) (*"Legislative History"*). Congress intended these features of administrative adjudication to parallel the traditional standards applied in the courts. *Steadman*, 450 U.S. at 101 (*quoting* S. Rep. No. 248, 79th Cong., 2d Sess. 365 (1946)). Congress did not leave room for agency corrections or deviations for any reason. "[I]t

will be the duty of the reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection. . . . " 92 Cong. Rec. 2148, 2159 (statement of Sen. McCarran). "Implied amendments [to the APA] shall be precluded." *Legislative History, supra* p. 7 at 43.[4] *See also Professional Reactor Operator Society v. U.S. Nuclear Regulatory Commission*, 939 F.2d 1047, 1052 (D.C. Cir. 1991).

The APA does not contemplate the allocation of burdens or standards of proof with an eye toward the identity of the party the proof favors. The third sentence of section 7(c) of the APA, in light of *Steadman*, most naturally means that ALJs may not find facts unless the facts are proven by a preponderance. This is the instruction to the factfinder that is embodied in section 7(c) "concerning the degree of confidence society thinks he should have in the correctness of factual conclusions. . . . " *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (*quoting Addington v. Texas*, 441 U.S. 418, 423 (1979)). No agency's regulatory gloss is necessary, and no agency's supersedure is appropriate.

The Third Circuit came to this conclusion in *Maher* and the court is correct in that holding.

---

[4] The tone of many of the comments of the framers and sponsors of the APA exhibit concern that full voluntary agency compliance with its provisions might not be readily forthcoming. The unusual rule against supersedure in section 12 underscores the concern. 5 U.S.C. § 559.

ARGUMENT

I. THE CIRCUITS AND THE AGENCY DISAGREE

There is no doubt that the circuits disagree. The Third Circuit here finds the true doubt rule to be incompatible with the APA, *Steadman* and *Mullins Coal*. On these authorities, the rule is invalidated. The Sixth Circuit and the Seventh Circuit find no such incompatibility and have approved the use of the rule. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993); *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993). The Fourth Circuit rejects the reasoning of the Seventh Circuit, but has deferred its consideration of the validity of the rule. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1098 n.7 (4th Cir. 1993).[5]

Even where the rule has been approved, there is little agreement on the reasoning that supports it. The only thing that has been consistent in DOL's defense of the rule is the inconsistency of the agency's arguments. Much of what is argued in the petition for certiorari is new or revisionist. Here, DOL argues variously that the APA does not apply, at least in the black lung claims, unless DOL wishes it, and then that it applies only to the degree

---

[5] DOL cites several cases arising in other circuits where an ALJ's use of a true doubt rule was approved. None of these cases involved a challenge to the validity of the rule, and they are not, therefore, in conflict with the Third Circuit's opinions here. No court of appeals has disagreed with the Third Circuit's invalidation of the rule in *Maher* in a case arising under the LHWCA. Prior applications of the rule in LHWCA cases have not been tested in the face of an APA challenge.

that DOL wishes. DOL's Petition for Writ of Certiorari at 24. But if the APA applies, then it does not allocate "burdens of persuasion" and the agency is free to do so consistent with the objectives of the LHWCA or BLBA. Those objectives, of course, contemplate favoring claimants, and if the agency elects to do so by embracing a true doubt rule, its judgment deserves deference. Finally, if the APA applies, and if it obligates factfinders to find facts only if they are supported by a preponderance of the evidence, then the remedial objectives of the BLBA and LHWCA supersede the APA. *Id.*

The Seventh Circuit held that the APA "unquestionably" applies in black lung adjudications. *Freeman United*, 988 F.2d at 710 n.6. This court, however, settled on the conclusion that the APA does not assign "burdens of persuasion" and that these burdens are assigned judicially. Taking the true doubt rule as its own, the Seventh Circuit adopts it, in light of certain legislative comments, as a matter of judicial preference. *Id.* 988 F.2d at 711. Support for the approach is drawn from a footnote in this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 383, 403 n.7 (1983), two snippets of legislative history and *Mullins Coal. Freeman United*, 988 F.2d at 711-12.

The Sixth Circuit agrees with the Seventh that "the true doubt rule is a judicial construct which sprang from" the remedial purpose of the BLBA. *Skukan*, 993 F.2d at 1236-7 n.8. The Sixth Circuit recognizes, however, that DOL's regulations assign the burden of persuasion to claimants on facts not legislatively presumed, but this court apparently does not believe that the job of assigning burdens is DOL's job. *Id.* 993 F.2d at 1238.

No court has agreed with DOL's belief that the courts must defer to DOL's interpretation of its regulations to extract the rule, and no court has agreed with DOL's view that, at least in black lung cases, it is bound by the APA at the agency's option only.[6] No court of appeals has agreed with DOL's unstated but apparent belief that deference should be accorded the agency's interpretation of the APA in light of the objectives of the BLBA and LHWCA. Deference is not appropriate on this account. *See Ardestani v. INS*, 112 S. Ct. 515, 526 (1991) (Blackmun J. dissenting); *Professional Reactor Operator Society*, 939 F.2d at 1051.

The only identifiable center of gravity for DOL, the Sixth Circuit and the Seventh Circuit has two simple components. The first is that the "burden of proof" footnote in *Transportation Management*, addressing the first sentence of section 7(c) of the APA, overrules or neutralizes the holding in *Steadman* addressing the third sentence in section 7(c).[7] The second is that the remedial

---

[6] DOL has argued from time to time, as it does here, that it is bound neither by the APA nor the procedural imperatives of the LHWCA. No court has agreed with DOL on these accounts, and indeed the plain language of section 19(d) of the LHWCA, 33 U.S.C. § 919(d), forbids DOL's interpretation, at least as to that provision. *See Director, Office of Workers' Compensation Programs v. Alabama By-Products Co.*, 560 F.2d 710, 718 (5th Cir. 1977); *Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310, 341-42 (7th Cir. 1977); *see also Trent Coal Co. v. Day*, 739 F.2d 116, 117 (3d Cir. 1984); *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 273 (5th Cir. 1979).

[7] This is quite plain. *Steadman* holds that the courts are not free, in an APA proceeding, to establish the standard for determining how much proof is needed to support a finding of fact

purpose of the BLBA allows the affirmation of a true doubt rule, because the rule favors claimants. The Third Circuit also acknowledged the remedial nature of the BLBA and LHWCA, but was unable to conclude that *Transportation Management* authorized a departure from *Steadman*, inasmuch as the two cases addressed different sentences in section 7(c) of the APA and different issues. *Maher*, 992 F.2d at 1282-83.

The on-the-record adjudication provisions of the APA apply in hundreds of different categories of proceedings conducted by many federal boards and agencies. Most of the statutes incorporating the APA carry a remedial or benevolent public purpose. The question that is presented here by DOL is whether the APA ought to give way when the agency finds it too constraining.

Two federal courts of appeals have effectively refused to follow this Court's decision in *Steadman*, and a federal agency has asked them not to do so. That surely merits this Court's attention. It is, perhaps, more important that the Department of Labor seeks to introduce a party identity based standard for evaluating proof in APA litigation, without congressional approval.[8] This is a

---

because "Congress has spoken." *Steadman*, 450 U.S. at 96. The Seventh Circuit thinks Congress was silent, thus authorizing a judicial assignment of the standard. *Freeman United*, 988 F.2d at 711. The Sixth Circuit agrees, citing *Freeman*. *Skukan*, 993 F.2d at 1236.

[8] Congress could, of course, adopt a true doubt rule for black lung and longshore claims. When procedures for the adjudication of publicly funded veterans benefits claims were revised and formalized in 1988, Congress expressly adopted a true doubt rule, codifying an informal but longstanding agency

dangerous and inappropriate path to take, and it is one that was anticipated and closed by the framers of the APA in their adoption of the rule against supersedure. 5 U.S.C. § 559. This Court should step in to enforce that rule.

II. THE THIRD CIRCUIT'S DECISION IN *MAHER* IS CORRECT

There is no language in either the BLBA or LHWCA suggesting a true doubt rule. DOL's LHWCA regulations are silent on the point as are the BLBA regulations in force for claims filed prior to the repeal of the statutorily mandated presumptions. *See* 20 C.F.R. Part 727. DOL's new BLBA regulations assign claimants the "burden of proving" their cases, 20 C.F.R. § 718.403, but elsewhere under a general heading state "Congress intended that claimants be given the benefit of all reasonable doubt." *Id.* § 718.3(c). No regulation articulates a "true doubt" rule as it is described by DOL.

The Social Security Administration ("SSA"), which adjudicated all black lung claims from 1970 to 1974, employed no true doubt rule, but required claimants to prove all facts not statutorily presumed, by a traditional

---

practice. 38 U.S.C. § 5107(b). DOL has not asked Congress to adopt a true doubt rule for either the BLBA or LHWCA. When the BLBA was substantially revised in 1982, to repeal most of the presumptions and rules of proof most helpful to claimants, DOL did not ask Congress to adopt a true doubt rule.

preponderance of the evidence. *Mullins Coal*, 484 U.S. at 154-55 n.27.[9]

There is no arguable source for the rule in the legislative history of the LHWCA, and DOL strains the relevant text in relying on the black lung legislative materials cited in support of the rule. DOL's Petition for Certiorari at 18-19 (*citing* S. Rep. No. 743, 92d Cong., 2d Sess. 11 (1972); S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977)). The 1972 Senate Report notes Congress's intent to resolve doubts in favor of claimants, but this comment prefaces the introduction of several new statutory presumptions and rules of proof enacted in 1972, for implementation by SSA. There was no DOL program at the time. In the next paragraph, the Committee stated: "The Committee bill gives the benefit of the doubt to claimants by [adopting the new statutory provisions]." S. Rep. No. 743, *supra*. Later in the same discussion, the Committee emphasizes that when the new statutory provisions do not apply, "[t]he Committee intends that the burden will be placed on the claimant to prove the existence of pneumoconiosis. . . . " *Id.* at 13. The 1972 passage, which is relied upon by the Sixth Circuit, the Seventh Circuit and DOL, is more naturally read to restrict SSA's authority to relax proof standards beyond what Congress wrote. SSA

---

[9] SSA applies no true doubt rule or its equivalent in disability insurance adjudications. Whether or not the APA applies in SSA's disability insurance programs, the decisions in *Skukan* and *Freeman United* suggest that a true doubt rule may be applied in SSA claims as a matter of judicial preference. The Social Security Act is no less remedial than the BLBA or LHWCA.

adopted no true doubt rule. The 1977 document, in context, is no more compelling. It simply recommends the promulgation of regulations containing more liberal criteria for objective testing. S. Rep. No. 209, *supra* p. 14 at 13. DOL overlooks the legislative materials accompanying the extensive 1981 amendments under which Ondecko's case was decided. These amendments reversed course in a program perceived by Congress to be out of control, by repealing virtually all of the liberalizing provisions referred to in the 1972 and 1977 materials.[10]

DOL also takes the Court on a curious trek in seeking to create a lineage for the true doubt rule dating back to the 1930s and the early days of the LHWCA. In arguing

---

[10] It bears mention also that much of DOL's discussion of the need for a true doubt rule is both misleading and disingenuous. DOL points out that black lung claimants are "sick and elderly individuals with limited resources," "who find it difficult . . . to prove that their diseases are totally disabling or coal mine related . . . ." DOL notes that clinical "tests" may be fallible "and that x-rays are imperfect means of ascertaining the existence of pneumoconiosis. . . . " *Id.* These rhetorical flourishes, if they were ever factual, have not been true for many years. Like any other federal program that transfers billions of dollars within a fairly restricted geographical area, the program has spawned its own related industries that serve the needs of claimants and employers alike. Few claimants with an arguable case will be abandoned by this system or will be unable to access it. Similarly, black lung is an exhaustively studied disease, and largely because of Congress's interest in it, x-ray and testing technologies are probably better than most. The case that is being presented to the Court here should not be influenced by the popular, but largely false, mythology often cited in black lung cases. Time has passed by these notions, and the 1981 amendments to the BLBA demonstrate congressional awareness of the current reality.

the case to the courts of appeals, DOL traced the rule to a 1978 Benefits Review Board decision in a black lung case. *Provance v. United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben. Rev. Bd. 1978). There is no articulation of a true doubt rule predating this decision, and none of the earlier LHWCA cases cited by DOL holds that employers must bear a "burden of persuasion" on all factual issues presented in a claim. For the most part, the earlier references to doubt resolving are judicial embellishments in cases where the adjudicator's findings are being sustained because they are supported by substantial evidence. *See e.g., Southern S.S. Co. v. Norton*, 101 F.2d 825, 827 (3d Cir. 1939); *Southern Pac. Co. v. Sheppard*, 112 F.2d 147, 148 (5th Cir. 1940).

The LHWCA cases cited for historical context focus generally on the presumption of occupational causation contained in section 20(a) of the LHWCA, 33 U.S.C. § 920(a), and virtually all of them predate the 1972 incorporation of the APA into the LHWCA. Pub. L. No. 92-576 § 14, 86 Stat. 1261 (1972). Section 20(a) of the LHWCA presumes that an injury or disease is occupationally related, but it shifts no ultimate burdens to employers. It is a bursting bubble rule that "falls out of the case" when contrary probative evidence is offered. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). This Court has previously rejected the theory that section 20(a) shifts ultimate burdens, and the opinion in the case fairly clearly precludes a section 20(a) based true doubt rule, as the rule is described by DOL. *U.S. Industries v. Director, Office of Workers' Compensation Programs*, 455 U.S. 608, 613-15 & n.7 (*quoting* 3A Larson, *The Law of Workmen's Compensation* § 78.10 at 15-2 (1976)).

It appears, in fact, that the ALJ in *Maher* layered a true doubt rule on top of section 20(a) because section 20(a) was not adequate to establish the claim. DOL defends this enhancement of the statutory rule, notwithstanding *Del Vecchio*, because of the independent viability of the true doubt rule. DOL's Petition for Writ of Certiorari at 10. This Court has often reminded the agency that the LHWCA may not be expanded beyond its terms on the pretext of boundless liberality. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *Morrison-Knudtsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 635-36 (1983); *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 282 & n.24 (1980).

No operational true doubt rule predates the Board's 1978 decision, and even after it was announced the rule was infrequently used in BLBA or LHWCA cases until fairly recently. DOL's attempt to provide a noble vintage for the rule is not accurate. For the most part, DOL's reasoning, and in particular, its deference claim are 1993 developments originating in this litigation. Were this a case in which the Court might be inclined to defer to the agency, and this should not be such a case, this Court would be deferring to a litigation-bred argument post-dating by thirteen years, the regulations being interpreted. DOL's deference claim is tenuous in this environment. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1991).

B. The solution to the questions presented here is not found in the remote sources and revisionist history presented by DOL, but in the plain language of the APA, its history and *Steadman*. Neither the BLBA nor the

LHWCA contains anything remotely resembling a true doubt rule. Both statutes, however, make the APA on-the-record adjudication provisions applicable "[n]otwithstanding any other provisions of this Act . . . . " 33 U.S.C. § 919(d). The APA prescribes standards of proof for the agency adjudications in which it applies. One of those standards is that ALJs needing to find facts may find them if they are supported by a congressionally determined "minimum quantity of the evidence." *Steadman*, 450 U.S. at 100. The minimum quantity of evidence that is acceptable to support a finding of fact in an APA proceeding is a preponderance. *Id.* at 100-104; *see also* H.R. Rep. No. 1980, 79th Cong., 1st Sess. 37 (1945). Where evidence is in conflict or "equally supports two inconsistent inferences," the evidence falls short of a preponderance and no fact is established. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 33, 39 (1933).

The third sentence of section 7(c) of the APA instructs the factfinder that "[a] sanction may not be imposed or rule or order issued" unless the APA proof standards are satisfied. Where evidence relating to a fact needed to support a rule, order or sanction[11] is no stronger or more persuasive than evidence to the contrary, no fact is proven and under the APA no fact may be found. *See e.g., NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 809 (4th Cir. 1975).

---

[11] The APA defines "sanction" to include "the whole or any part" of an agency's assessment of damages or compensation. 5 U.S.C. § 551(10)(E).

Section 12 of the APA provides, *inter alia*:

> Subsequent statutes may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly. . . .

5 U.S.C. § 559.

Supersedure is narrowly construed and it must be statutory. *Brownell v. We Shun*, 352 U.S. 180, 185 (1956); *Marcello v. Bonds*, 349 U.S. 302, 310 (1958); *Professional Reactor Operator Society*, 939 F.2d at 1052; *Attorney General's Manual on the Administrative Procedure Act* 75 (1947).

DOL has made no appropriate case for supersedure and seeks to escape section 12 mostly by reading any meaning out of the third sentence of section 7(c) and ignoring this Court's interpretation of it in *Steadman*. DOL's argument is that the ALJ does not look only at the proof when it is being weighed, but rather looks to see who the parties are before getting on with the job. Ambiguities in the proof are then resolved not based upon the strength and persuasion of the proof alone, but in the final analysis, on the identity of the party the proof favors. It seems quite clear that this is not what the authors and proponents of the APA had in mind. *See Legislative History, supra* p. 7 Foreward (1946).

DOL's discussion of shifting burdens, burdens of persuasion, and *Transportation Management* diverts attention from the central issues that are presented here. It is surely true that standards of proof and burdens of proof are related elements in the course of decisionmaking in APA matters as well as all other kinds of litigation. It is also true that the terminology and operation of these rules of

proof may become confusing, and if there has been anything consistent in DOL's arguments in support of the true doubt rule, it is in the agency's efforts to exploit this confusion.

The confusion is not, however, too difficult to dispel. The preponderance-of-the-evidence standard, as it is described in section 7(c) of the APA and *Steadman*, embodies a simple instruction. The instruction is that facts ultimately found must be supported by evidence that is at least slightly better than contrary evidence. DOL seeks to use the burden of proof language in the first sentence of section 7(c) to diminish the meaning intended in the third sentence. It may be that the APA does not assign ultimate burdens of persuasion, but the APA clearly does establish a fact finding standard. It does not do violence to any part of section 7(c) to effectuate the meaning of the third sentence and let the burdens fall where they may for all the parties to any proceeding. This reading harmonizes *Steadman* and *Transportation Management*, and accords with the intent of the APA's framers that section 7(c) operate as a whole. *Legislative History*, *supra* p. 7 at 216, 302.

> The first and second sentence of the section [7(c)], therefore mean that where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case, an agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance.

Id. at 270-71.

DOL argues for a reading that creates irreconcilable tension between the first and third sentences of section 7(c). DOL's reasoning is wrong on that account alone. The Third Circuit was correct in its reading of the relevant language.

III. THIS IS AN IMPORTANT CASE

DOL argues that the case is important because it may affect future BLBA and LHWCA claims, and indeed that is true. For the private litigants here, it is important for another reason. The comprehensive standards for administrative adjudication in the APA protect private litigants, not only in BLBA and LHWCA matters, but in many other matters of importance as well, from the attempts of agencies to re-design basic adjudicatory procedures indirectly to advance their policy objectives. The APA was designed to ensure a level playing field when litigants enter an ALJ's courtroom. 5 U.S.C. § 559. The APA maximizes the independence of the adjudicator and guarantees the fairness of the basic rules insulating both from the ebb and flow of agency policies and politics. Agencies have no great affection for the APA because it is a restraint. Researchers have attributed the phenomenal growth in the number of federal non-APA judges and relative stagnation in the growth in the size of the ALJ corps, at least in part, to agency dissatisfaction with the independence of APA adjudicators and the inviolability of APA rules. *See generally*, Verkuil, *et al.*, *Administrative Conference of the United States, The Federal Administrative Judiciary* (1992).

DOL may convince Congress to free it from the APA or expressly to enact a true doubt rule. Until that time, this Court should enforce the APA according to its terms.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted for the purpose of affirming the Third Circuit's holdings in these cases.

Respectfully submitted,

JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR,
WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, Pennsylvania 15907

MARK E. SOLOMONS
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400K
1801 K Street, N.W.
Washington, D.C. 20006

Supreme Court, U.S.
FILED
JAN 12 1994
CLERK

No. 93-744

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-744

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent Greenwich Collieries explicitly agrees (Greenwich Br. in Opp. 22) that the petition for a writ of certiorari in this case should be granted, recognizing both that the courts of appeals are divided (*id.* at 9) and that the issue is an important one (*id.* at 21). Respondent

Maher Terminals, while not expressly urging certiorari, likewise agrees that "every consideration important to determining whether a writ of certiorari should issue exists" in this case. Maher Br. in Opp. 29. We therefore submit that it is appropriate to treat this as a case in which all parties agree that further review is appropriate.[1]

Both respondents nonetheless assert that the government has mischaracterized the origins and operation of the "true doubt" rule. Greenwich Br. in Opp. 15-17; Maher Br. in Opp. 7, 19-20. In particular, Maher argues (*ibid.*) that no "rule of doubt" was applied to factfinding under the Longshore and Harbor Workers' Compensation Act (LHWCA) until *Young & Co.* v. *Shea*, 397 F.2d 185, on petition for rehearing, 404 F.2d 1059, 1061 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969). Maher also argues (Br. in Opp. 5-6, 9-11, 21-25), and Greenwich Collieries suggests (Br. in Opp. 4), that as applied under the LHWCA and the Black Lung Benefits Act (BLBA), the "true doubt" rule does not merely allocate the risk of non-persuasion, but allows factfinders to avoid weighing evidence and permits awards that are not based on substantial evidence. These contentions merit a brief response.

[1] Since the filing of our petition in this case, petitions have also been filed in the cases decided by the Sixth and Seventh Circuits that conflict with the decisions rendered by the Third Circuit in this case. See *Freeman United Coal Mining Co.* v. *Jones*, No. 93-935; *Consolidation Coal Co.* v. *Skukan*, No. 93-964. The petitioner in *Freeman United* has requested that its petition be held pending a decision on the petition in this case (93-935 Petitioner's Motion to Hold Ruling on Petition for Certiorari in Abeyance), and the petitioner in *Consolidation Coal* has consented to similar treatment of the petition in that case (93-964 Pet. 11).

The "true doubt" rule provides that when evidence submitted by a claimant and the party opposing an award of benefits is of "equal weight," the remaining doubt is to be resolved in favor of the claimant. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 144 n.12 (1987); see also 93-474 Pet. App. A2 (describing rule as applied below in *Maher Terminals*). Petitioner's predecessors have applied this rule in administering the LHWCA since at least 1943. See *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 887 n.1 (2d Cir. 1944). It is one application of the more general principle that "[d]oubts, *including the factual*, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton*, 220 F.2d 820, 821 (D.C. Cir. 1955) (emphasis added). Respondent Maher Terminals is therefore incorrect in stating (Br. in Opp. 20) that no case held that a doubt rule applies to factfinding under the LHWCA until the Fifth Circuit's 1968 decision in *Young & Co.* v. *Shea*, *supra*. The "true doubt" principle was well established by the time of that decision, as the *Young & Co.* court itself recognized. See 397 F.2d at 188 (citing cases).[2]

Nor is there merit to the contention that the "true doubt" rule allows administrative law judges to avoid weighing evidence, or permits courts to affirm awards

[2] Maher also identifies three decisions stating that LHWCA claimants had the burden of proving or showing causation. Br. in Opp. 19-20, citing *Calbeck* v. *Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Gooding* v. *Willard*, 209 F.2d 913 (2d Cir. 1954); and *Eschbach* v. *Contractors, Pacific Naval Air Bases*, 181 F.2d 860 (7th Cir. 1950). The courts that decided those cases were not presented with the question of which party bears the burden of persuasion when evidence is in equipoise, and did not acknowledge other decisions recognizing that doubtful questions should be resolved in favor of claimants. Accordingly, they cannot be read as rejecting use of the "true doubt" rule.

that are not supported by substantial evidence. The Benefits Review Board properly vacates awards that do not explain how the ALJ weighed relevant evidence, because "[t]he resolving doubts rule * * * should not become an easy device with which administrative law judges can abdicate their primary responsibility as hearing officers to weigh the evidence and make factual findings." *Betz* v. *Arthur Snowden Co.*, 4 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981). Courts of appeals, in turn, review under a substantial evidence standard both those close cases in which the ALJ has determined that the evidence is *not* in equipoise (see *Sprague* v. *Director, OWCP*, 688 F.2d 862, 868 n.12 (1st Cir. 1982)) and those in which the ALJ has determined that it is. See *Old Ben Coal Co.* v. *Battram*, 7 F.3d 1273, 1274-1276 (7th Cir. 1993); *F.H. McGraw & Co.*, 145 F.2d at 888.[3]

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1994

---

[3] Some courts have stated generally that the statutory policy of resolving doubtful factual questions in favor of a claimant results in "a less stringent standard of persuasion" than "the preponderance-of-credible-evidence test." *Young & Co.*, 397 F.2d at 188; see also *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481-482 (5th Cir. 1986). Those decisions do not allow claimants to prevail without having adduced substantial credible evidence in support of their claims; they merely recognize that LHWCA (or BLBA) litigation differs from ordinary civil litigation, and that where the "true doubt" rule applies, employers bear the ultimate risk of non-persuasion.

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

No. 93-744

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

JOHN J. BAGNATO
Spence, Custer, Saylor, Wolfe & Rose
400 U.S. Nat'l Bank Bldg.
Johnstown, Pa. 15901
(814) 536-0735
Counsel for Respondent Greenwich Collieries

JOSEPH T. STEARNS
Kenny & Stearns
26 Broadway
New York, N.Y. 10004-1882
(212) 422-6111
Counsel for Respondent Maher Terminals, Inc.

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioner

PHILIP J. ROONEY
Israel, Adler, Ronca & Gucciardo
160 Broadway
New York, N.Y. 10038
(212) 227-1350
Counsel for Respondent Pasqualina Santoro

PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 10, 1993
CERTIORARI GRANTED JANUARY 14, 1994

59 pp

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-744

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS

Page

Relevant Docket Entries, United States Court of Appeals for the Third Circuit:

Greenwich Collieries 1

Maher Terminals 4

Opinions and Orders in *Maher Terminals*:*

United States Court of Appeals for the Third Circuit 8

Benefits Review Board 25

Administrative Law Judge, Ruling Denying Petition for Reconsideration 34

Administrative Law Judge, Decision and Order 36

* The opinions of the court of appeals, the Benefits Review Board, and the Administrative Law Judge in *Greenwich Collieries*, and the court of appeals' order denying rehearing in *Maher Terminals*, are reprinted in the appendix to the government's petition for a writ of certiorari and have not been reproduced here.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No. 92-3270

GREENWICH COLLIERIES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

RELEVANT DOCKET ENTRIES

5/18/92 Agency Case Docketed. Petition (rev) filed by Greenwich Collieries. Service ma[de] on 5/18/92. USCA Receipt No. 018274 and Receipt Date 5/18/92. (sma)

• • • • •

6/16/92 RECORD, filed. (sma)

• • • • •

7/27/92 BRIEF on behalf of Petitioner Greenwich Collieries, Pages: 22, Copies: 10, Delivered by mail, filed. Certificate of service date 7/27/92. (wab)

7/27/92 APPENDIX on behalf of Petitioner Greenwich Collieries, Copies: 4 Volumes: 1, Delivered by mail, filed. Certificate of service date 7/27/92. (wab)

8/31/92 BRIEF on behalf of Respondent Director OWCP, Pages: 46, Copies: 10, Delivered by mail, filed. Certificate of Service date 8/31/92. (atr)

9/10/92 REPLY BRIEF on behalf of Petitioner Greenwich Collieries, Copies: 10, Delivered by mail, filed. Certificate of service date 9/10/92. (jlb)

• • • • •

9/30/92 MOTION filed by Respondent Director OWCP to file supplemental appendix. Certificate of Service dated 9/29/92. (agp)

10/5/92 ORDER (Clerk) granting motion by Respondent Director, OWCP to file supplemental appendix with filing as of the date of this order, filed (agp)

10/5/92 APPENDIX on behalf of Director OWCP. Copies: 4, Volumes: 1 Delivered by mail, filed. Certificate of service date 9/29/92. (See 10/5/92 Order). (atr)

• • • • •

1/12/93 ARGUED 1/12/93 Panel: Hutchinson, Scirica and Rosenn, Circuit Judges. (agb)

• • • • •

3/23/93 OPINION (Hutchinson, Scirica and Rosenn, Authoring Judge, Circuit Judges), filed. (kot)

3/23/93 JUDGMENT, petition for review is granted. The decision and order of the Benefits Review Board is vacated and the cause remanded for further proceedings consistent with the opinion of this Court, filed. (kot)

• • • • •

4/6/93 ORDER (Clerk) granting motion to extend time to file petition for rehearing en banc as amended by

letter dated April 1, 1993, by Respondent Director OWCP. Extension granted to May 5, 1993. (kot)

5/5/93 PETITION by Respondent for rehearing in banc. Certificate of service dated 5/5/93, filed. (kot)

• • • • •

5/13/93 MOTION filed by Respondent, Director OWCP, for consolidation on rehearing with No. 92-3222. Certificate of Service dated 5/12/93. (kot)

• • • • •

6/2/93 ORDER filed (Hutchinson, Circuit Judge) granting motion filed by Respondent Director OWCP, for consolidation with No. 92-3222, for consolidation of rehearing. (kot)

• • • • •

6/25/93 ORDER filed (Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Authoring Judge, Scirica, Cowen, Nygaard, Alito, Roth, Lewis and Rosenn*, Circuit Judges) denying petition for in banc rehearing by Respondent, Director OWCP. *Honorable Max Rosenn, U.S. Circuit Judge, was limited to voting for panel rehearing. (kot)

7/6/93 MANDATE ISSUED, filed. (kot)

• • • • •

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 92-3222

MAHER TERMINALS, INC., PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

RELEVANT DOCKET ENTRIES

4/24/92 Agency Case Docketed. Petition (rev) filed by Maher Terminals Inc. Service made on 4/24/92. USCA Receipt No. 028185. Receipt Date 4/24/92. (sma)

* * * * *

6/10/92 RECORD, filed. (jas)

* * * * *

7/2/92 LETTER MOTION by Pasqualina Santoro to amend case caption by adding Pasqualina Santoro as a party in the caption, filed. Certificate of Service dated 6/29/92. (awi)

7/7/92 ORDER (Clerk) granting motion to amend caption by Pasqualina Santoro. Ms. Santoro will be added to the caption as a respondent. (awi)

* * * * *

7/27/92 BRIEF APPENDIX on behalf of Petitioner Maher Terminals Inc, Pages: 49, Copies: 10, Delivered by mail, filed. Certificate of Service Date 7/23/92. (See 7/27/92 Order). (atr)

8/21/92 BRIEF on behalf of Pasqualina Santoro, Pages: 26, Copies: 10, Delivered by mail, filed. Certificate of Service date 8/21/92. (atr)

8/26/92 BRIEF on behalf of Respondent Director OWCP, Pages: 26, Copies: 10, Delivered by mail, filed. Certificate of Service date 8/26/92. (atr)

* * * * *

9/1/92 ORDER (CLERK) granting motion by Respondent Pasqualina Santoro to accept the appendix incorporated in the brief with filing as of the date of this order, filed. (agp)

9/1/92 SUPPLEMENTAL APPENDIX attached to appellee's brief on behalf of Pasqualina Santoro, filed. (See order dated 9/1/92). (atr)

* * * * *

9/9/92 REPLY BRIEF on behalf of Petitioner Maher Terminals Inc, Copies: 10, Delivered by mail, filed. Certificate of service date 9/9/92. (atr)

* * * * *

1/12/93 ARGUED 1/12/93 Panel: Hutchinson, Scirica and Rosenn, Circuit Judges. (agb)

* * * * *

4/19/93 OPINION (Hutchinson, Scirica and Rosenn, Authoring Judge, Circuit Judges), filed. (kot)

4/19/93 JUDGMENT, petition for review is granted. The order of the Benefits Review Board is vacated

with directions to remand the case to the administrative law judge for further consideration consistent with the opinion of this Court, filed. (kot)

* * * * *

5/4/93 ORDER (Clerk) granting motion for extension of time until June 3, 1993 in which to file petition for rehearing by Respondent Director OWCP. (kot)

* * * * *

5/14/93 ORDER (Clerk) granting motion for extension of time to file petition for rehearing by Respondent Pasqualina Santoro. Extension granted until 6/3/93. (kot)

* * * * *

6/2/93 ORDER filed (Hutchinson, Circuit Judge) granting motion filed by Respondent Director OWCP, for consolidation with No. 92-3270 for consideration of rehearing. (kot)

6/3/93 PETITION by Respondent, Director, OWCP, for rehearing in banc. Certificate of service dated 6/2/93, filed. (kot)

6/3/93 PETITION by Respondent, Pasqualina Santoro, for rehearing in banc. Certificate of service dated 6/2/93, filed. (kot)

6/25/93 ORDER filed (Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Authoring Judge and Scirica, Cowen, Alito, Roth, Lewis and Rosenn*, Circuit Judges) denying petition for in banc rehearing by Director OWCP. (kot)

6/25/93 ORDER filed (Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Authoring Judge, Scirica, Cowen, Nygaard, Alito, Roth, Lewis and Rosenn, Circuit Judges) denying petition for in banc rehearing by Respondent Pasqualina Santoro. (kot)

7/6/93 MANDATE ISSUED, filed. (kot)

* * * * *

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 92-3222

MAHER TERMINALS, INC., PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

PASQUALINA SANTORO, RESPONDENT

Argued Jan. 12, 1993
Decided April 19, 1993

Before: HUTCHINSON, SCIRICA, and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circit Judge.

We recently had before us the question of whether the "true doubt" rule could properly be applied in the resolution of a claim for benefits under the Black Lung Benefits Act. We concluded it could not. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). This petition for review of a decision of the Director, Office of Workers' Compensation Programs, raises a comparable question relating to the claimant's burden of proof in cases involving the Longshore and Harbor Workers' Compensation Act (Act), as amended, 33 U.S.C. §§ 901-45 (1988). The ALJ in the present case used

the true doubt rule, which calls for the resolution of all true doubts in favor of the claimant, to award benefits to the claimant under the Act despite evidentiary equipoise. The issue in this case is whether the Administrative Procedure Act (APA), 5 U.S.C. §§ 501 *et seq.* (1988) prohibits the application of the true doubt rule in cases involving the Act.

This proceeding originated when Pasqualina Santoro (Mrs. Santoro), the widow of the late Michael Santoro (decedent), filed a claim under section 9 of the Act against Maher Terminals, Inc. (Maher), for temporary total disability benefits due the decedent during his lifetime and death benefits on account of his injury and death. *See* 33 U.S.C. §§ 908(b), 909.

Following a hearing, at which the parties vigorously contested whether the disability and death were work-related, the Administrative Law Judge (ALJ) found the evidence on the question evenly balanced and resolved his doubts in favor of the claimant. He awarded benefits and denied a motion for reconsideration. The petitioner, Maher, appealed to the Benefits Review Board (Board) of the United States Department of Labor, which sustained the ALJ in an unpublished decision. It then timely appealed to this court. We vacate the Board's order and remand the case for further consideration consistent with this opinion.[1]

I. FACTS

Because this appeal turns on an interpretation of a narrow question of law, i.e., whether the true doubt rule, as utilized in this case under the Act, contravenes the APA, there is no need to embark on a rendition of the voluminous medical and factual details which are involved in this litigation. We recite

---

[1] This court exercises jurisdiction over a final order of the Board for an injury which occurred within this circuit pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. § 921(c).

only those facts necessary to gain insight into the underlying issues of this appeal.

On July 23, 1985, the decedent, who was then 62 years old, reported an accidental injury while employed by Maher at Port Elizabeth, New Jersey. The claimant testified that on that day, the decedent was driving a vehicle off of a ship at Maher's port. Then, in order to avoid a shackle that was swinging towards him, the decedent threw his body to the right and jerked the back of his neck.

The next day, the decedent visited Dr. Visconti, who diagnosed the injury as a strain of the right and left trapezius muscles. The doctor released the decedent to return to work on July 31, 1985. The decedent returned to work on August 1 for four hours in the employ of International Terminal Operating Company and on August 2 for one full day in the employ of Maersk Container Service Company. On August 3, the decedent and his wife began a long-scheduled vacation to the New Jersey shore, which Dr. Visconti had approved.

During his vacation, the decedent began to experience numbness in the fingers of his left hand, as well as continuing shoulder and neck pain, prompting him to visit Dr. Greifinger, an orthopedic surgeon. Dr. Greifinger reported a diagnosis of cervical strain on a preexisting spondylosis.

The decedent continued his vacation, but called Dr. Visconti on August 14 concerning increased neck and shoulder pain, as well as a new pain in the left arm. Dr. Visconti advised him to go to the hospital for a heart examination, which the decedent did. Finding nothing wrong with his heart, the doctors at the hospital released the decedent, counseling him to wear a neck brace and to take medication. His wife testified that the next day her husband was unable to get out of bed because of numbness in his left arm. Thereupon, he was admitted to a hospital at Point Pleasant, New Jersey.

At the hospital, Dr. Weinstein, following a physical examination and myelogram, diagnosed the patient's condition as a

cervical thoracic root avulsion and cervical thoracic myelopathy, and he recommended further testing. On August 18, 1985, Dr. David Yazdan, a neurosurgeon, examined the decedent, and Dr. Yazdan suspected a possible intramedullary tumor or a cystic formation within the spinal cord and recommended immediate surgery. Upon operating on the decedent the next day, Dr. Yazdan found a tumor on the spinal cord, which he identified as an astrocytoma. Subsequently, Santoro was transferred to the Veterans Administration Hospital at Orange, New Jersey, where he died in March 1986.

II. STATUTORY BACKGROUND

Our review of questions of legal interpretation is plenary. *See, e.g., Carozza v. United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984).

In bringing a claim pursuant to the Act, the claimant bears the initial burden of production, i.e., to establish a *prima facie* case that he suffered an injury and that employment conditions were sufficient to cause the injury. A failure to carry this initial burden defeats the claim. If the claimant establishes a *prima facie* case, then he or she is entitled to a rebuttable presumption under the Act that the injury was work-related and thus compensable. If the employer successfully rebuts the presumption, the factfinder must resolve the factual dispute on the basis of the evidence as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87, 56 S.Ct. 190, 193, 80 L.Ed. 229 (1935).

The problem in many cases, as in this proceeding, is that the factfinder finds the evidence so close that he or she is beset by grave doubt as to the critical issue. Some courts have held that, when considering the evidence on the record as a whole, the judge may resort to the true doubt rule:

> "[T]he factfinder operates under the statutory policy that all doubtful fact questions are to be resolved in favor of

> the injured employee because the intent of the statute is to place the burden of possible error on those best able to bear it." *Noble Drilling Co. v. Drake,* 795 F.2d 478, 481 (5th Cir. 1986). *In effect, the statute eases the ordinary preponderance of the evidence standard applicable in most civil suits. Id.*

Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 90-91 (5th Cir. 1990) (emphasis added); *see also Fidelity & Casualty Co. v. Burris,* 59 F.2d 1042, 1044 (D.C.Cir. 1932) ("Where there is doubt, it should be resolved in favor of the injured employee or his dependent family."); *Parsons Corp. of Cal. v. Director, OWCP, U.S. Dep't of Labor,* 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White,* 584 F.2d 569, 574 (1st Cir. 1978); *Freeman United Coal Mining Co. v. OWCP,* 988 F.2d 706 (7th Cir. 1993).

The genesis of the true doubt rule is found in *Burris,* 59 F.2d at 1044:

> The underlying purpose of all compensation laws is to provide money indemnity in case of injury where there is no assignable fault. Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty owing by society to an injured employee to secure him protection, and this the act seeks to accomplish through the means of insurance built up by premiums paid by employers. Where there is doubt it should be resolved in favor of the injured employee or his dependent family.

The court in *Burris* offered no analytical basis for the true doubt rule. The court properly noted that the compensation laws have their root in society's recognition of a duty to protect injured employees, but the court's leap to the conclusion that this justifies the abandonment or alteration of the claimant's burden of persuasion has no logical basis in the law.

Nonetheless, the true doubt rule has become a convenient tool for some courts and administrative agencies to allocate the ultimate burden of persuasion, i.e., to allocate the risk of non-persuasion, to the employer on the theory that it is the party best able to bear that risk.

In the instant case, the ALJ's opinion explained his finding that Mrs. Santoro had established a prima facie case and, further, that Maher had successfully rebutted the section 920(a) presumption. As a result, the precedent in *Bowers* mandates that the ALJ evaluate all of the evidence on the record, without regard to the statutory presumption:

> Once the employer has carried his burden by offering testimony sufficient to justify a finding [that the death was not work-related], the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.

Del Vecchio, 296 U.S. at 286, 56 S.Ct. at 193.

Contrary to Maher's assertions,[2] the ALJ adhered to *Bowers* precisely, stating:

> Therefore, the Employer having indicated another cause for, and having severed the possible connection between the claimant's total disability and death, the presumption is deemed overcome and the case is decided on the basis of the record as a whole.

In evaluating the evidence on the record as a whole, however, the ALJ ultimately did apply the true doubt rule. He

---

[2] Maher argues extensively about the merits of the presumption and its use as affirmative evidence in its brief. Because the ALJ did not actually make use of the presumption in this case, there is no need to address these arguments.

found that the evidence was in equipoise and then summarily resolved the doubt in favor of the claimant:

> In view of this record, acceptance of the employer's position would be inconsistent with the purposes and policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant.

III. DISCUSSION

Section 19(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d), requires that any hearing under the Act be conducted in accordance with the provisions of section 554 of the APA. In *Greenwich Collieries*, we held that the true doubt rule was inconsistent with the APA in cases involving the Black Lung Benefits Act.

Addressing the claimant's ultimate burden of persuasion under the Act involved in the case *sub judice*, the first sentence of section 7(c) of the APA provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

5 U.S.C. § 556(d).

The third sentence of that section continues:

> A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

Id.

The language of the statute, therefore, informs us that, unless superseded by statute, the APA requires that the claimant bear the burden of proof.[3] It is unfortunate that the

[3] Section 12 of the APA allows for the APA's authority to be superseded by express provisions in statutes. This means that an express statutory provision, such as the section 920 presumption in the Act, would override the rules set forth in the APA. However, none of the following amount to *express statutory* provisions having the authority to supersede the APA on the issue of the degree of evidence which will satisfy the burden of persuasion: the legislative history to the Act, which enunciates its humanitarian and remedial purpose, longstanding use of the true doubt rule by the Board, judicial acceptance of the rule, or Congressional inaction.

etymology of the phrase "burden of proof" has so developed that it can be used to mean solely the burden of persuasion, solely the burden of producing evidence, or both. *Greenwich Collieries*, 990 F.2d at [734].

As we observed in *Greenwich Collieries*, some of the confusion surrounding the phrase "burden of proof" has been addressed by the Supreme Court. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983), the employer asserted that the General Counsel, as the proponent of an order that the employer had committed unfair labor practices, must bear the burden of proof under section 7(c) of the APA. The General Counsel did not dispute that it bore the burden of presuasion with respect to the *prima facie* case regarding unfair labor practices, but it asserted that it should not shoulder the burden of persuasion regarding an affirmative defense that was available to the employer. The Supreme Court stated in *dicta*, "Section 7(c), however, determines only the burden of going forward, not the burden of persuasion." *Transportation Management*, 462 U.S. at 403 n. 7, 103 S.Ct. at 2475 n. 7.

Two years earlier, however, the Supreme Court stated, "The language of [section 7(c) of the APA] itself implies the enactment of a standard of proof, and that standard of proof is the preponderance of the evidence standard." *Steadman v. SEC*, 450 U.S. 91, 98, 102, 101 S.Ct. 999, 1006, 1008, 67 L.Ed.2d 69 (1981). Therefore, *Steadman*, in conjunction with

section 7(c), teaches that the third sentence of section 7(c) means that a sanction may not be imposed or rule or order issued unless the proponent of the sanction, rule, or order proves his or her case by a preponderance of the evidence.

Facially, *Steadman* and *Transportation Management* may appear irreconcilable. However, there are two reasons why our holding today that the third sentence of section 7(c) places the burden of persuasion upon the claimant is consistent with both Supreme Court precedents.

First, in *Transportation Management*, only the first sentence of section 7(c) was at issue, and therefore the Court did not consider the meaning of the third sentence of that section. In that case, the respondent argued that the first sentence of section 7(c), which states that the proponent of an order shall have the burden of proof, means that the claimant bears the burden of persuasion. The Court disagreed, stating:

> Section 7(c) of the [APA] provides that the proponent of an order has the burden of proof. . . . Section 7(c), however, determines only the burden of going forward, not the burden of persuasion.

Transportation Management, 462 U.S. at 404 n. 7, 103 S.Ct. at 2475 n. 7.

Although the Court appears to have expansively stated that section 7(c) as a whole applies merely to the burden of production, the Court's interpretation of the substance of section 7(c), albeit in a footnote and in *dicta*, was limited to the first sentence. *See id.* ("Section 7(c) of the [APA] provides that the proponent of an order has the burden of proof."). Thus the Court's own language, which it quoted from the first sentence of section 7(c), evinces that the only portion of section 7(c) with which it was grappling was the first sentence. This analysis is supported by the absence of any reference by the Court in *Transportation Management* to its decision in *Steadman*.

Moreover, in Environmental Defense Fund, Inc. v. E.P.A., 548 F.2d 998, 1004, 1013-1015 (1976), *cert. denied sub nom. Velsicol Chem. Corp. v. E.P.A.*, 431 U.S. 925, 97 S.Ct. 2199, 53 L.Ed.2d 239 (1977), upon which the *Transportation Management* Court relied in reaching its conclusion regarding section 7(c), the court dealt only with the first sentence of section 7(c). There, the court announced that although the APA stated that "except as otherwise provided by statute, the proponent of a rule or order shall have the burden of proof," *Id.* at 1004, "the 'burden of proof' [the APA] casts upon the 'proponent' is the burden of coming forward with proof, not the ultimate burden of persuasion." *Id.* at 1013. Therefore, the Supreme Court's *dicta* stating that section 7(c) is limited to the burden of production was an analysis only of the first sentence of that section.

In contrast, in *Steadman*, the Court specifically addressed the third sentence of section 7(c). The Court there stated that the third sentence of section 7(c) means that the standard of proof necessary to carry the burden of persuasion under the APA is the preponderance of the evidence standard. Therefore, *Steadman*, standing alone, does not allocate the burden of persuasion, but rather defines its scope as a preponderance of the evidence. It may be suggested that the APA goes no further than this and fails to allocate the burden of persuasion, which gives each administrative agency the discretion to do so without contravening the APA, provided that the party to whom it allocates the burden proves its case by a preponderance of the evidence.

The APA, however, does indeed allocate the burden of persuasion. The language of the APA, coupled with that of *Steadman*, teaches that a sanction may not be imposed, or rule or order issued, except on a preponderance of the evidence. It is typically the claimant who strives to have a rule or order issued, and the APA prohibits such an issuance unless the

proponent of that rule or order proves his or her case by a preponderance of the evidence. Therefore, it is usually the claimant who bears the burden of providing his or her case by a preponderance of the evidence.

For example, in the case *sub judice*, Mrs. Santoro seeks to have an order issued that she is entitled to benefits under the Act. She seeks to change the status quo. Hence it is she who bears the burden of proving entitlement to benefits by a preponderance of the evidence. Thus, *Steadman*, and not *Transportation Management*, deals with the third sentence of section 7(c), and the former is therefore the more relevant precedent for our purposes today.

We find support for our analysis in the legislative history of section 7(c), which states in part:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence.

H.R.Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946) U.S.Code Cong.Serv. 1195. The first sentence above is relied upon to show that the first sentence of section 7(c), which likewise discusses "the burden of proof," refers only to the burden of production, a proposition not presently in dispute. The second sentence above echoes the language of the third sentence of the statute, which has been interpreted as establishing the standard of proof for the burden of persuasion under the APA, i.e., a preponderance of the evidence.

Steadman, 450 U.S. at 97-102, 101 S.Ct. at 1006-08. The *Steadman* Court's analysis of the statute and its legislative history directly links the statutory requirement that no order shall issue unless "supported by and in accordance with . . . substantial evidence" with the preponderance standard.

If no order shall issue except supported by and in accordance with a preponderance of the evidence, the inevitable conclusion is that the proponent of that order must bear the burden of persuasion by a preponderance of the evidence. We concede that the legislative history previously cited, taken together with *Steadman*, suggests that the party who seeks a denial of relief is *also* required by section 7(c) to sustain such denial by a preponderance of the evidence. In practice, however, it is difficult to imagine how this could lead to an interpretation of section 7(c) that allocates the burden of persuasion *solely* to the party who contests the grant of relief. If this is done, and the party contesting the claim for relief does not sustain his or her burden of persuasion because the evidence is found to be in equipoise, an order in favor of the claimant will issue that is not supported by a preponderance of the evidence, a result in clear contravention of the APA.

Nor is it possible for adversarial parties to bear the same burden at the same time on the same issue or issues. The only interpretation of the third sentence of section 7(c), in conjunction with its legislative history, that does not of itself contravene the statute or suggest an impossibility is one which allocates the burden of persuasion to the proponent of the order, i.e., the party initiating the proceeding, on the issues raised by that party, but allows the burden to be shifted to the party opposing the grant of relief as to issues raised by the opponent, e.g., affirmative defenses. *See generally Transportation Management.*

A further reading of the legislative history reinforces this view:

> The first and [third] sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a *prima facie* and *substantial* case, he will prevail unless his evidence is discredited or rebutted. . . . Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.*

H.R.Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946) U.S.Code Cong.Serv. 1195 (emphasis added). As noted earlier, the party initiating the case has the general burden of coming forward with a *prima facie* case, *id.*; we now see that this party, if it meets both its burden of production (*prima facie*) and burden of persuasion (where "substantial" is construed as standing for the preponderance standard), it will succeed, unless its evidence is unconvincing. Thus, the party initiating the proceeding, i.e., the proponent of the order for relief (the claimant in the present case), has both elements of the burden of proof. Although the burden of producing evidence may be shifted during the progress of a proceeding from one party to the other, the burden of persuasion remains with the proponent of the order for relief, and it cannot be shifted on the issues raised by the proponent.

There is yet a second reason why our holding today is fully consistent with *Transportation Management*: The issue in that case, in contrast to the one *sub judice*, was whether it was permissible under the APA to place the burden of persuasion for an *affirmative defense* upon the employer.

Under the National Labor Relations Act (NLRA), the General Counsel bears the burden of proving by a preponderance of the evidence that antiunion animus contributed to the employer's decision to discharge an employee. *Transportation Management*, 462 U.S. at 397-99, 103 S.Ct. at 2472-73; 29 U.S.C. § 160(c) (1988). The Board has held that, regardless of whether the General Counsel carries its burden with respect

to the underlying claim, the employer can avoid the conclusion that it violated the NLRA by proving by a preponderance of the evidence that the employee would have been discharged for permissible reasons regardless of his involvement in protected union activities. *See, e.g., Transportation Management*, 462 U.S. at 401, 103 S.Ct. at 2474.

The Court of Appeals for the First Circuit held it to be error for the Board to place the burden on the employer to prove that the discharge would have occurred notwithstanding the presence of the forbidden motive. The court reasoned that the General Counsel, as the proponent of the order, had to carry the burden of persuasion both on the underlying claim and on the affirmative defense. The Supreme Court reversed, stating that the General Counsel, as proponent of the order, bears the burden of persuasion with regard to the underlying violation, but that the Board may place the burden of persuasion regarding an affirmative defense upon the employer. *Transportation Management*, 462 U.S. at 404, 103 S.Ct. at 2475.

The facts of *Transportation Management*, therefore, confine it to the following sequitur: Where an affirmative defense is available to the employer, the NLRB may place the burden of persuasion as to this affirmative defense on the employer under the APA. This, of course, is only *after* the claimant has first carried his or her burden of proving the elements of an unfair labor practice.

In sum, the first sentence of section 7(c) places the burden of production on the proponent of the order or rule, i.e., the proponent must go forward with evidence or the case will come to an end. The third sentence of that section establishes the standard for the burden of persuasion, i.e., a preponderance of the evidence, and also allocates the burden of persuasion to the claimant as the proponent of the order or rule. A logical exception to that rule exists, however, when an affirmative defense is raised. In that scenario, the claimant bears

the burden of production and persuasion on the subject of the litigation; then, only after the claimant has met this burden, does the defense bear the burden of persuasion on the affirmative defense.

Because the case *sub judice* does not involve an affirmative defense, the burden of production and persuasion both rest upon the claimant, Mrs. Santoro.

Moreover, as discussed exhaustively in *Greenwich Collieries*, 990 F.2d at 736-737, the true doubt rule impermissibly allows a claimant to prevail despite having failed to sustain his or her burden of persuasion by a preponderance of the evidence. Therefore, the claimant here is required to prove by a preponderance of the evidence that she was entitled to benefits under the Act. The ALJ found that the evidence was in equipoise, which, by definition, means that the claimant did not carry her burden of proof by a preponderance of the evidence. The finding in her favor, therefore, was error.

Although we agree that a compensatory statute such as the Act should be construed liberally in favor of the claimant, *see Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 72 S.Ct. 223, 96 L.Ed. 225 (1952), Congress has written certain presumptions into its compensatory statutes which are quite favorable to the claimant. As we recently stated in *Greenwich Collieries*, we believe that these presumptions effectuate the statute's liberal purpose, and the APA simply does not allow us to grant the liberal construction urged by Mrs. Santoro. Although we recognize that the Act should be construed liberally, that does not empower us to rewrite the provisions of the Act, which require the claimant to prove the material allegations of the claim. *Greenwich Collieries*, at 735.

Finally, we address the cases which have upheld the true doubt rule, *see supra* pp. 1279-80, and express our reasons for rejecting them. Most of these opinions that have upheld the true doubt rule, with the exception of *Freeman*, have not

seriously considered the applicability of the APA to the question at hand. *See, e.g., Avondale Shipyards*, 914 F.2d 88; *Burris*, 59 F.2d 1042; *Parsons*, 619 F.2d 38; *White*, 584 F.2d 569. We do not see how the provisions of the APA may be disregarded. The APA is the pole-star which guides our course and is the fundament upon which we strike down the ALJ's use of the true doubt rule in this case.

For example, the Fifth Circuit, in upholding the true doubt rule, has observed, "In effect, the [true doubt rule] eases the ordinary preponderance of the evidence standard applicable in most civil suits." *Avondale Shipyards*, 914 F.2d at 90-91. However, as discussed above, the APA does not allow such an arbitrary alleviation of the claimant's burden of proof, a point which that court did not consider.

In *Freeman* the issue was whether the claimant had proven that he suffered from pneumoconiosis. The *Freeman* court itself noted that the Supreme Court has decided in this context that the X ray produced by the claimant may not merely "constitute evidence" of pneumoconiosis, but must show the presence of pneumoconiosis by a preponderance of the evidence. *Freeman*, 988 F.2d at 709 (citing *Mullins Coal Co. v. Director, OWCP, U.S. Dep't of Labor*, 484 U.S. 135, 138, 147-52, 108 S.Ct. 427, 429, 433-37, 98 L.Ed.2d 450).

The *Freeman* court went on to uphold the ALJ's use of the true doubt rule in that case, holding that the rule is consistent with the APA. We believe, however, that this conclusion cannot follow. If a claimant must produce an X ray to prove the presence of pneumoconiosis by a preponderance of the evidence, then use of the true doubt rule is improper because it allows the claimant to prevail despite having failed to meet this burden. *See Greenwich Collieries*, 990 F.2d at 736-737.

IV. CONCLUSION

In sum, we hold that the APA prohibits application of the true doubt rule to cases involving benefits under the Longshoremen's [and] Harbor Workers' Compensation Act because: (1) under the APA, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence; and (2) the true doubt rule allows a claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence. This contravenes the APA. Because there is no express provision in the Act which overrides the APA; the claimant must prove that her husband's death was related to his work injury by a preponderance of the evidence.

It is not clear, however, if the ALJ in this case ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard. It is possible that, upon reaching the point of equipoise, and believing the true doubt rule to be valid, the ALJ halted his inquiry short of deciding whether Mrs. Santoro's evidence preponderated.

Accordingly, the order of the Benefits Review Board will be vacated with directions to remand the case to the ALJ to make this determination. If the ALJ again concludes that the evidence is in equipoise, then Maher must prevail.

[SEAL]

U.S. DEPARTMENT OF LABOR
Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

BRB No. 89-443

PASQUALINA SANTORO (WIDOW OF MICHAEL SANTORO)
CLAIMANT-RESPONDENT

v.

MAHER TERMINALS CORPORATION
SELF-INSURED EMPLOYER-PETITIONER

DATE ISSUED: MAR 27, 1992

DECISION AND ORDER

Appeal of the Decision and Order—Award of Benefits and Ruling Denying Petition for Reconsideration of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney and Angelo C. Gucciardo (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Joseph T. Stearns (Kenny & Stearns), New York, New York, for self-insured employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order—Award of Benefits and Ruling Denying Petition for Reconsideration (87-LHC-833) of Administrative Law Judge Aaron Silverman on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

On July 23, 1985, decedent was working for employer driving a car off a cargo ship when a loose shackle swung towards the windshield. In an attempt to avoid the collision, decedent threw his body to the right, allegedly resulting in a "whiplash" movement. Decedent was treated the next day by Dr. Visconti, an osteopath, who diagnosed a strain of the right and left trapezius muscles. Dr. Visconti released decedent to return to work on July 31, 1985, but anticipated follow-up appointments for one to two weeks. Decedent apparently returned to work on August 1, 1985 and worked for one and one-half days.

On August 3, 1985, decedent and his widow (claimant) began a long-scheduled vacation which Dr. Visconti approved. Decedent interrupted his vacation to be examined by employer's consultant. Dr. Greifinger, on August 9, 1985. Dr. Greifinger

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

indicated that subsequent to the July 23, 1985 accident, decedent had complained of neck pain, which radiated into both shoulder and numbness into all the digits of the left lower extremity.[1] Dr. Greifinger diagnosed cervical strain on a pre-existing sponylosis. Decedent returned to his vacation, but on August 14, 1985 he telephoned Dr. Visconti complaining of increasing neck and shoulder pain, as well as new pain in his left arm. Dr. Visconti, suspecting possible cardiac problems, advised decedent to go to the hospital. Claimant testified that decedent's heart examination at St. Mary's Hospital was negative and that the examining physicians; relating decedent's trouble to his neck, supplied him with a neck brace and medication.

On August 15, 1985, decedent complained of being unable to get out of bed, nausea, and complete numbness in his left arm and was taken by ambulance to Point Pleasant Hospital, where he was examined by Dr. Weinstein, a neurosurgeon. After a physical examination and review of a myelogram, Dr. Weinstein reported swelling of the spinal cord from C3 to T1 and an irregularity of the root at C7 or T1 on the left side. Dr. Weinstein's impressions were cervical thoracic root avulsion and cervical thoracic myelopathy.

Dr. Yazdan, a neurosurgeon, also examined decedent. After reveiwing x-rays, a CT Scan, and a myelogram, Dr. Yazdan reported a mild to moderate degree of spondylosis and a widening of the shadow of the cord at C3 to C4 and below suggestive of an intramedullary tumor or cyst within the cord and recommended immediate surgery. When Dr. Yazdan operated on decedent, a tumor was found which was later diagnosed as astrocytoma, a very rare form of nerve cell cancer. Following surgery, decedent became paraplegic and mute. On March 11, 1986 decedent died, and his certificate of death lists "cardiac arrest" as the "immediate cause" of death, which

[1] Dr. Greifinger mistakenly refers to the numbness as occurring in the digits of the left upper extremity.

was a consequence of decedent's cervical astrocytoma. Claimant sought compensation under the Act, contending that the July 23, 1985 work injury aggravated decedent's pre-existing astrocytoma resulting in his disability and death.

In his Decision, the administrative law judge invoked the Section 20(a), 33 U.S.C. § 920(a), presumption to link decedent's death and disability to his work injury. The administrative law judge further determined that employer had introduced evidence sufficient to rebut the presumed causal connection between decedent's condition and his employment and accordingly proceeded to weigh the record evidence regarding causation as a whole. After weighing the evidence and finding it to be in equipoise, the administrative law judge applied the statutory policy that all doubtful questions of fact are to be resolved in favor of the injured employee, *see Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969), and found, based on Dr. Yazdan's opinion, that decedent's death and disability were causally related to the work injury.

The administrative law judge denied employer's Petition for Reconsideration, noting that, as the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the Administrative Procedure Act, 5 U.S.C. § 557(c)(3)(A,) and the Board's decision in *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981) (Miller, J., dissenting), no further consideration was necessary.

Employer appeals the award of benefits challenging the validity of the true doubt rule and arguing that the evidence of record as a whole fails to provide any basis for an award of benefits. Claimant responds, seeking affirmance.[2]

[2] Employer filed a motion to expedite. Claimant opposed this motion, contending that it was not actually a motion to expedite but an untimely reply brief. Employer's motion to expedite is moot. Because employer's motion contains substantive arguments, however, we accept it and the responses thereto as supplemental briefs pursuant to 20 C.F.R. § 802.217.

Employer's attack on the validity of the "true doubt" rule is premised on the theory that application of the rule violates the United States Supreme Court's holding in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), that the Section 20(a) presumption does not constitute affirmative evidence. Employer argues that once the Section 20(a) presumption is rebutted, the administrative law judge must then determine whether claimant succeeded in establishing causation by a preponderance of the evidence as any other rule would relieve claimant of the burden of proving coverage thereby obliterating any meaningful distinction between the Act as a compensation scheme and the Act as an insurance program.

Employer's argument regarding the applicability of the true doubt rule is rejected. Although *Del Vecchio* holds that once the Section 20(a) presumption is rebutted, it falls out of the case and does not constitute affirmative evidence, *Del Vecchio* is in no way inconsistent with application of the true doubt rule. Under *Del Vecchio*, once the presumption is rebutted and falls out of the case, the administrative law judge must then determine causation by weighing the evidence as a whole without regard to the presumption. It is at this point that the true doubt rule comes into play. This rule requires that if after weighing the conflicting evidence any doubt remains as to how an issue is to be resolved, the doubt is to be resolved in favor of the injured employee because the intent of the statute is to place the burden on those best able to bear it. *Young & Co. v. Shea, supra.* As the true doubt rule is well established in cases under the Act and employer has failed to raise any persuasive arguments attacking its validity, we decline to depart from it. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980). Moreover, as it is well-established that a "preponderance of the evidence" standard is not applicable in proceedings under

the Act, we also reject employer's argument in this regard. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *see generally NLRB v. Universal Camera Corp.*, 240 U.S. 474 (1951); 33 U.S.C. § 921(b)(3).

Having determined that the administrative law judge did not apply an erroneous standard in analyzing causation under the Act, we narrow our inquiry to whether the administrative law judge properly evaluated the evidence under the applicable standard. In the instant case, as claimant established a harm, a neck injury, and it was undisputed that the July 23, 1985 work accident occurred, the administrative law judge properly found that claimant was entitled to the Section 20(a) presumption. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). The administrative law judge also properly noted that Dr. Yazdan's opinion provided evidentiary support for claimant's assertion that decedent's disability and death were work-related. Dr. Yazdan opined that decedent's spinal cord tumor was slow-growing and dormant prior to the work injury but became symptomatic when the work accident produced edema around the parenchymal (outer) covering of the tumor and that pressure from the swelling of the tumor within the spinal cord led to decedent's gradual neurological problems and death. The administrative law judge also properly found Dr. Derby's opinion that decedent's disability and death were due to the inevitable progression of the underlying tumor without reference to any external event sufficient to establish rebuttal of Section 20(a). *See generally James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

Finding rebuttal established, the administrative law judge proceeded to consider the causation issue based on the evidence as a whole. After thoroughly discussing and weighing the evidence of record, the administrative law judge found that, despite his sometimes inconsistent or contradictory testimony, Dr. Yazdan did not waiver from his basic position that

the accident precipitated decedent's disability and death. He noted also that the record establishes an unbroken chain of events supporting a finding of causally-related neck pain and that the alternative offered by employer based on Dr. Derby was that the abrupt escalation of the astrocytoma following the accident was purely fortuitous. The administrative law judge stated that on this record, acceptance of employer's position would be inconsistent with the purposes and policy of the Act. Concluding that the issue of causation remained debatable, the administrative law judge resolved all doubt in favor of the claimant. Accordingly, the administrative law judge found decedent's disability and death related to the work accident.

On appeal, employer contends that Dr. Yazdan's opinion does not provide substantial evidence to support the administrative law judge's causation determination because he wrongfully presumed that decedent had injured his neck in the work accident and his surgical findings and description of the morphology of decedent's tumor are inconsistent with his edema theory. Employer in addition asserts that medical science has not embraced the theory that astrocytomas may be caused or aggravated by trauma.

All of employer's arguments regarding the credibility of Dr. Yazdan's opinion were considered below and rejected in turn. The administrative law judge issued a comprehensive opinion, addressing all the evidence in compliance with the rule that where an employment injury aggravates, accelerates or combines with a preexisting condition, the entire resulting disability or death is compensable, *see Independent Stevedoring Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), as well as the true doubt rule. The administrative law judge found that in spite of the alleged inconsistencies in his testimony, Dr. Yazdan's opinion remained credible because he never waivered from his basic position that decedent's neck pain, neurological deficit

and death were traceable to decedent's job-related injury. Although he also found certain elements of Dr. Derby's contrary opinion persuasive, he found that the evidence as a whole regarding causation was debatable and properly determined that under such circumstances the true doubt rule was applicable. Because employer has failed to establish that the administrative law judge's crediting of Dr. Yazdan's opinion is inherently incredible or patently unreasonable, we affirm this determination. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 185 (1991). Under the aggravation rule, the hastening or acceleration of death or disability is compensable. *See Independent Stevedore Co.*, 357 F.2d at 812; *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, J., dissenting). In this regard, Dr. Yazdan opined that decedent's underlying astrocytoma may not have become symptomatic for another 20 years but for the work-related injury and related his disability and death to edematous pressure around the tumor resulting from this injury. We conclude that Dr. Yazdan's opinion provides substantial evidence to support the administrative law judge's determination that decedent's death and disability are related to his work injury. As the administrative law judge did not err in relying on this opinion and the true doubt rule, his award of disability and death benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order—Award of Benefits and Ruling Denying Petition for Reconsideration are affirmed.

SO ORDERED.

/s/ Betty J. Stage
BETTY J. STAGE, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Reno E. Bonfanti
RENO E. BONFANTI
Administrative Law Judge

[SEAL]

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

CASE NO. 87-LHC-833
OWCP NO. 2-88978

IN THE MATTER OF

MICHAEL SANTORO (DECEASED)
PASQUALINA SANTORO (WIDOW), CLAIMANT

v.

MAHER TERMINALS, INC., EMPLOYER

Date Issued: December 15, 1988

RULING DENYING PETITION FOR RECONSIDERATION

By Decision and Order of November 22, 1988, the subject Claimant was awarded disability and death benefits.

On December 9, 1988, the Employer petitioned for reconsideration on the issue whether the rule of doubt was properly applied by the administrative law judge to the facts found.

It is believed that the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of the Administrative Procedure Act and the views expressed by the Benefits Review Board in *Betz v. Arthur Snowden Company,* 14 BRBS 805 (1981), and further consideration would serve no useful purpose.

Accordingly, the petition for reconsideration is, hereby, *DENIED.*

/s/ Aaron Silverman
AARON SILVERMAN
Administrative Law Judge

DATE: Dec. 15, 1988
Washington DC

[SEAL]

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 87-LHC-833
OWCP No. 2-88978

IN THE MATTER OF

MICHAEL SANTORO (DECEASED)
PASQUALINA SANTORO (WIDOW)

v.

MAHER TERMINALS, CORP., SELF-INSURED EMPLOYER

Date Issued: November 22, 1988

DECISION AND ORDER—AWARD OF BENEFITS

Proceeding for temporary total disability and death benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (Act).

Issues

1. Whether the Claimant was entitled to compensation for temporary total disability after August 2, 1985, the last day he worked, to March 11, 1986, when he died.

2. Whether the Claimant's death was causally related to a July 23, 1985 work-injury which is claimed to have aggravated an underlying cervical astrocytoma.

Statement of the Case

Michael Santoro, hereinafter, the Claimant, who died March 11, 1986, had been employed as a longshoreman by Maher Terminals, Inc. (Employer) at Port Elizabeth, New Jersey. On July 23, 1985, he was driving a car off a cargo ship when a loose shackle swung towards it. (Tr. 16). Fearing that the shackle would break through the windshield, he threw his body to the right, presumably below windshield level. Mrs. Santoro testified at the formal hearing held on March 30 and 31, 1988, that, in describing to her his reaction to avoid the oncoming shackle, he "turned the car and doing so snapped the back of his neck and he fell to the seat of the car and the shackle went through the windshield anyway." (Tr. 215). The parties dispute whether his action to avoid the shackle resulted in an actual "whiplash" movement. (Tr. 78-94). At the time of the accident he was 62 years old.

According to Dr. William A. Visconti, Jr.'s report, the accident occurred at 1:30 p.m. on July 23, 1985, and he first treated the Claimant the next day. Dr. Visconti, a D.O., reported that the Claimant told him that he injured his back, and described the circumstances of the accident. He diagnosed strain of the right and left trapezius muscles, and recommended ultrasound therapy and parafon forte tablets. He deemed the Claimant able to return to work on July 31, 1985, but indicated that follow-up treatment should be pursued for one to two weeks more. Mrs. Santoro testified that the Claimant worked a full eight hours on August 1, 1985, but, because of pain in the back of his neck and across his shoulders, he was only able to work approximately 1/2 day on August 2. (Tr. 218-219). However, an NYSA-ILA work printout and an affidavit of the corporate secretary of Maher Terminals, Inc., indicated that the Claimant returned to work for four hours on August 1, 1985, and last worked eight hours on August 2, 1985. (EX-A). The Claimant was paid compensation for tem-

porary total disability for the period preceding his return to work, from July 23, 1985, through July 30, 1985.[1]

On August 3, the Claimant and his wife began a long-scheduled vacation at the Jersey shore. She testified that because of continued pain in the back of his neck and shoulders he telephoned Dr. Visconti prior to their departure to see about going on vacation. Dr. Visconti allegedly advised him to go, taking advantage of the sun and rest. (Tr. 220). Owing to increased pain in her husband's neck and shoulders, she telephoned Dr. Visconti again the next day for further medical advice. (Tr. 221) Dr. Visconti advised continued rest and sunshine. (Tr. 222).

In the interim, the Claimant received a letter from the Employer informing him to consult Dr. David J. Greifinger. Mrs. Santoro testified that, although her husband was inclined initially to postpone this consultation until after their vacation, he was by that time experiencing numbness in the fingers of his left hand, in addition to shoulder and neck pain. (Tr. 222). Dr. Greifinger, an orthopedic surgeon, examined the Claimant on August 9, and submitted a report indicating that subsequent to the July 23, 1985 accident, the Claimant "developed pain about the neck which he describes as radiating into both shoulders." (CX-33). The report noted that the Claimant also described numbness into all of the digits of the left upper extremity, a finding of "recent times." After physical and x-ray examinations, Dr. Greifinger diagnosed cervical strain on a preexisting spondylosis. He advised the Claimant to continue applying heat and to take aspirin.

The Claimant returned to the shore that same day, but on August 14 telephoned Dr. Visconti again complaining of increasing neck and shoulder pain, as well as a new develop-

[1] There is nothing in the record to show whether the Claimant worked on July 31, and if not, why not.

ment—left arm pain. Suspecting possible cardiac involvement because of the Claimant's prior history and his left arm pain, Dr. Visconti suggested that he go to the hospital for a heart check. The heart examination at St. Mary's Hospital in Hoboken, New Jersey, was negative. However, Mrs. Santoro testified that the examining physicians said that his trouble was in the neck and supplied him with a neck brace and medication. (Tr. 227, 228). When the medication failed to alleviate the pain, the Claimant called an ambulance on August 15 to take him and his wife to a nearby hospital. Mrs. Santoro testified that he was unable to drive since he got up that morning unable to get out of bed, complaining that he wanted to vomit, and experiencing complete numbness of his left arm, and that she can't drive. (Tr. 229).

He was admitted to emergency services of the Point Pleasant Hospital in Point Pleasant, N.J. at 9:39 p.m. where the admission form indicated among other things that he said "an accident four weeks ago [and] injured his neck." Dr. S. Weinstein, a neurosurgeon, was one of the first of several physicians to examine the Claimant. According to his report, he received a history from the Claimant that, subsequent to the accident at work, "he suffered immediate onset of pain across the lower trapezii, bilaterally, and the lower neck." The Claimant also related to him the evolution of his symptoms and complaints up to his admission to Point Pleasant Hospital. After a physical examination and review of a myelogram, Dr. Weinstein reported swelling of the spinal cord throughout C3 to T1 and an irregularity of the root at C7 or T1 on the left side. He diagnozed cervical thoracic root avulsion and cervical thoracic myelopathy and recommended further testing and consultation. (CX-1).

Dr. Yazdan, a neurosurgeon, examined the Claimant next. In a report dated August 18, 1985, Dr. Yazdan noted that the Claimant's history "goes back to a recent work-related acci-

dent that he had during which he sustained a neck injury." (CX-2). After his review of x-rays, a CT scan, and the myelogram, Dr. Yazdan reported a mild to moderate degree of spondylosis, a widening of the shadow of the cord at C3 level down to C4 and further down, which raised the possibility of an intramedullary tumor or a cystic formation within the cord and he recommended immediate surgery. (CX-6). He operated on the Claimant and found a tumor in the spinal cord identified as an astrocytoma.

The Claimant remained a patient at Point Pleasant Hospital until transferred to the Veterans Administration Hospital in East Orange, New Jersey, where he remained a paraplegic and mute until he died on March 11, 1986. The certificate of death (CX-4) lists "cardiac arrest" as the "immediate cause," which was said to have been "a consequence of [deceased's] cervical astrocytoma."

Mrs. Santoro contends that her husband's astrocytoma was aggravated by the July 23, 1985 work-related injury, and hastened his death.

Findings and Conclusions

I

The Employer paid compensation for temporary total disability from July 23 to July 31, 1985, when Dr. Visconti advised that the Claimant could return to work. However, it contests any causal connection between the July 23 injury and disability from August 1, 1985, to the date of the Claimant's death and between the injury and his death.

Under section 20(a) of the Act, it is presumed, in the absence of evidence to the contrary, that a claim comes within the provisions of the Act. The Claimant, however, has the burden of showing the nature and extent of his injury. *Brocato v. Universal Maritime Service Corp.*, 9 BRBS 1073 (1978).

The section 20(a) presumption applies to the issue of whether an injury is causally related to employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976). Before section 20(a) is applicable, a Claimant must establish that he or she sustained some harm, and that working conditions existed or that an accident occurred that could have caused the harm. *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326 (1981). Once a Claimant establishes these two elements of his or her *prima facie* case, then the section 20(a) presumption applies to link the harm with the employee's employment. *Lacy v. Four Corners Pipeline*, 17 BRBS 139 (1985). Application of the section 20(a) presumption then shifts the burden to the employer to come forward with substantial evidence countering the presumed relationship between the employee's injury or resultant condition and the work environment. *See Swinton, supra; Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981).

The Claimant sustained a work injury on July 23, 1985. On demonstrating an injury and circumstances at work which could have caused the alleged injury, the section 20(a) presumption of causation is properly invoked. *Kelaita v. Triple A. Machine Shop, supra.* To overcome the presumption, the Employer must introduce "substantial evidence to the contrary," which the courts have interpreted as evidence specific and comprehensive enough to sever the potential connection between the resultant impairment and work environment. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). If the Employer is successful, the section 20(a) presumption no longer controls, and the issue of causation is resolved on the whole body of evidence. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

In a short note dated October 10, 1985, Dr. Yazdan wrote that the Claimant was totally disabled and his condition was

related to the neck injury he sustained at work. (CX-5). In an Attending Physician's Report dated October 21, 1985, Dr. Weinstein set forth his diagnosis of cervical thoracic root avulsion and cervical thoracic myelopathy indicating that the condition was due to the work-related injury. In a letter dated October 31, 1985, Dr. Yazdan set forth a diagnosis of cervical myelopathy secondary to post traumatic spondylotic and neoplastic disorder of the cervical cord and concluded that the work-related injury precipitated his condition causing total disability.

At the formal hearing, Dr. Yazdan testified that the Claimant's turmor in his spinal cord was dormant and asymptomatic until his accident at work. In addition to spraining and straining the neck muscles and ligaments around the spondylotic spine and nerve root, the trauma of the whiplash caused an initial swelling (edema) around the parenchymatous (the tissue around the tumor). Then, the constant rubbing of the swollen spinal cord against the vertebral canal owing to the Claimant's ordinary regular movement of his head gradually increased the swelling. The swelling caused the pressure that triggered his symptoms, led to his neurological breakdown, and hastened his death.

In rebuttal of the presumption and Dr. Yazdan's opinion on causal relation, the Employer presented the testimony of Dr. Bennett W. Derby, a diplomate in pathology and neurology and, among other impressive professional credentials and assignments, long affiliated with the University Hospital, New York Medical School. Although he had never examined the Claimant, he had carefully reviewed all of his pertinent medical records. According to Dr. Derby, the evidence failed to establish a whiplash or neck injury; if there was such an injury, the Claimant would have experienced immediate pain and neurological collapse "on the spot;" Dr. Yazdan's explanation involving edema is "medically impossible;" and the Claimant's

disability and death were due to the inevitable progression of the underlying tumor "without reference to any external event."

Therefore, the Employer, having indicated another cause for, and having severed the possible connection between the Claimant's total disability and death, the presumption is deemed overcome and the case is decided on the basis of the record as a whole.

II

The Employer argues that the integrity of Dr. Yazdan's analysis must depend on two things: (1) the occurrence of immediate and excruciating pain at the moment the Claimant's spinal cord contacted the vertebral canal as a result of the work-related accident, and (2) the presence, in fact, of edema gradually increasing and causing the pressure leading to the Claimant's neurological collapse. These depend on the assessment of Dr. Yazdan's candor and the reasonableness of the inferences that can be drawn on the basis of all the available information. Further, Dr. Yazdan's candor should be assessed on the basis of the consistency of the opinions he expressed or by his ignorance of the complete medical record.

It submits that inconsistency in Dr. Yazdan's opinion can easily be demonstrated by his differing expressions on the nature of the injury the Claimant sustained, the severity of the trauma or pain experienced, the appearance of the spinal cord, the presence of edema in the cord, and the characteristics of the astrocytoma.

Accordingly, it contends that Dr. Yazdan's opinion on causal connection between the Claimant's accident and his disability and death should not be preferred over that of Dr. Derby who had reviewed all the medical records whereas Dr. Yazdan had not seen the reports of Dr. Visconti and Dr. Greifinger in which the Claimant's history and complaints differed from Dr. Yazdan's consultation report.

III

A material issue in this case is whether the Claimant experienced neck pains which persisted from the time of the July 23, 1985 accident to the time Dr. Yazdan examined him.

The Employer argues that there is no valid medical evidence in the record to support Dr. Yazdan's statement in his consultation report that the Claimant's history went "back to a recent work-related accident during which he sustained a neck injury." It argues that Dr. Visconti's report fails to show that the Claimant sustained a whiplash or any other type of neck injury or that the Claimant complained of neck pain or any condition that would have prompted Dr. Visconti to take an x-ray. Since Dr. Visconti diagnosed bilateral trapezius strain on the basis of subjective complaints and palpation of the area, any inferences of neck pain through trauma and contact of the spinal cord with the vertebral canal are obviated. It contends further that the Claimant's complaints of neck pain to Dr. Greifinger were "new" complaints, appearing but a few days before Dr. Greifinger's examination on August 9, 1985.

Dr. Greifinger's medical report reveals that left arm numbness and not the Claimant's neck pain was of "recent origin." Dr. Greifinger noted:

> . . . The Patient stated that he hit something which then then came up and hit the windshield of the vehicle. *He developed pain about the neck* which he describes as radiating into both shoulders. He has also described numbness into all of the digits of the left upper extremity. This latter finding has been in *recent* times.

(EX-4; emphasis added). Two other references in this report make no mention that the neck pains were of recent origin. However, on examination Dr. Greifinger found "Motions of the cervical spine were restricted with a complaint of pain in virtually all postures." (C-4). Regarding Dr. Greifinger's

findings, the Employer refers to Dr. Derby who testified that he could not agree with Dr. Greifinger's diagnosis of a cervical strain on a pre-existing spondylosis because there are no findings of muscular symptoms necessary to support that diagnosis.

It is concluded that the weight of the evidence is sufficient to support a finding that, as Dr. Yazdan testified, the Claimant complained of neck pain "all along." The record shows that the Claimant gave a history of neck pain starting with the accident to all the physicians who examined him after Dr. Visconti. It would be unreasonable to infer that under the circumstances the Claimant, who was so fearful about what was wrong with him, would deliberately lie about the history of his pain to a doctor from whom he would be seeking relief. Secondly, since he did not know what was wrong and had no reason to believe the condition could be due to something other than his most recent disability for which the Employer had already assumed liability, there is little reason to believe the history he gave to the examining physicians was motivated by a quest for secondary gain. Thirdly, in agreement with Dr. Yazdan, Dr. Derby testified that spinal cord astrocytomas are "very very rare" tumors and "if a guy walks into your office you do not think of cervical astrocytoma." He explained that with Dr. Greifinger's findings of neurological symptoms in the Claimant's left arm the diagnosis cannot be muscular or a sprain. It must be the spinal cord. If, as Dr. Derby believes, that Dr. Greifinger misdiagnosed a muscular problem even partially based presumably on the Claimant's complaints with the neurological symptoms evident then the value of Dr. Visconti's simple diagnosis of muscular strain before such telltale symptoms appeared has to be regarded with considerable reservation. Lastly, Mrs. Santoro, who was determined to be a credible witness testified that the Claimant complained of neck pain from the very beginning.

IV

The basic issue, then, is whether the Claimant's disability and death, as well as his neck pains, were causally related to trauma on July 23, 1985, or solely a result of the spontaneous eruption and natural progression of his astrocytoma.

Dr. Yazdan testified that astrocytomas are extremely rare in the spinal cord. They are generally slow-growing and can be present for many years before a patient becomes symptomatic. He testified that a tumor "leathery" in texture, in contrast to a softer or "mushy" one, generally grows more slowly and is less infiltrating and malignant. He testified that upon reaching the tumor within the spinal cord during the myelotomy, he found that "it appeared to be slightly fluctuant, very firm and leathery in consistency . . ." (Tr. 39). According to Dr. Yazdan, with Dr. Derby in general agreement, whether a tumor like an astrocytoma is rapidl growing or aggressive can be confirmed on the basis of an observation or analysis of it being leathery or mushy.

Although Dr. Derby conceded that tough leathery-type tumors are slow-growing, he indicated and the Employer agreed that Dr. Yazdan's testimony concerning whether the tumor's prominent feature, the mushroom deformity at C3-C4, was thin and fluctuant or firm and leathery was inconsistent with his August 19, 1985 operative report, as well as, his testimony on cross-examination.

Notwithstanding vigorous cross-examination on his different descriptions of the tumor's morphology, in the final analysis, Dr. Yazdan firmly maintained that the mushroom portion was quite hard and denied that because parts of the tumor were fluctuant, they were mushy. In evaluating his overall testimony against this particular charge of inconsistency, note is taken of his October 31, 1985 letter to an attorney in which he wrote, "The tumor had a very rough and leathery-like consistency. . . ." (C-6) That was over a year before the claim

for benefits was filed in this matter in November 1986, and it is reasonable to assume apparently long before he could have anticipated the test he would undergo at the hearing concerning his conflicting testimony.

Although subject to call as conjecture, note is also taken of the possibility, with some foundation in the record, that owing to a communication gap the use of the word "fluctuant" by Dr. Yazdan received a meaning he did not intend or expected it to convey. His testimony at page 183 of the transcript leads to that impression:

> Q Okay. You found, at least in areas of this tumor, did you not, that the tumor was fluctuant.
>
> A *It appears fluctuant—*
>
> Q On the—
>
> A —by touching—by touching it, you see?
>
> Q Okay.
>
> A However, when we punctured it, because anytime there's a fluctuation, you got a puncture, you do less damage to the cord than if you can evacuate the cyst.
>
> So the whole purpose of this whole thing is to be able to save as much of the cord as possible. So when we did that, there was no fluid, *then I knew that the fluctuation was just going back and forth of the lesion, under the needle.* (Underlining added).

What Dr. Yazdan seems to be saying is that rather than mushy, as fluctuant can be defined, the mushroom part of the tumor was "pliant" which does not rule out its texture as tough and leathery.

V

The significance to Dr. Yazdan of a slow-growing, leathery-type tumor is that, in his opinion, the Claimant's tumor, but for the work incident, could have remained dormant for many

years. Until the accident, the Claimant was symptom free. The trauma caused the edema which contributed to his disability and death.

The Employer spelled out how Dr. Yazdan contradicted himself on the nature and the severity of the trauma and argued against his "theory" because of his ignorance or uncertainty concerning not only the nature and extent of the injury, but also the site of the injury, in addition to the fact that he never saw or reported evidence of edema.

The Employer contends that Dr. Derby's opinion is entirely consistent with the medical evidence. Dr. Derby testified:

> THE WITNESS: This is my opinion based on the information in the hypothetical question I was just asked in which I asked to assume that neck pain had been present since the day of the accident persistent thereafter into the full evolution with the first appearance of neurological signs a good many days later. I won't repeat the dates, you're familiar with this, a long delay. This is medically impossible. We have a tumor—correction, we have a spinal cord at the cervical level which is shot through with tumor so bad that it's necrotic.
>
> Although the spinal cord tumor itself shows minimal widening the cord is further indented by at least one, one report or two, second report, osteophytes pushing in from the vertebral bodies from the front.
>
> BY JUDGE SILVERMAN
>
> Q How long are those osteophytes, what are we talking about, needle point bony spurs?
>
> A They're spurs like coming off the back of rooster's hoof.
>
> Q What are we talking about?
>
> A Bony—
>
> Q In size.
>
> A They're bony protuberances.

> Q I understand. What size are we talking about, needle point size?
>
> A No.
>
> Q Pencil point size?
>
> A Pencil point thickness. They come off like a bar and move on a broad front, sometimes more on one side, sometimes more on the other but if in the middle line it indents the cord. So here we have a man whose cervical spinal cord is shot through with tumor which is so aggressive that the spinal cord is necrotic at that level which in addition is compromised by these two osteophyte pencil thickness indentations in a side to side manner, pushing in. If this man had a flexion extention, that is to say whiplash sort of mechanism injury on July 23, 1985 so severe as to have caused pain, back neck pain, he would have had immediate neurological decompensation, and I'm going to spell that out, a flexion extension. I am asked to assume, I do not believe but I am asked to assume a "whiplash" injury, that's a whip like—like you're snapping a whip, that's a bad shake-up, number one; number two, it implies a pretty severe degree of flexion and extension. It would not be medically possible for a man with that kind of injury with the cervical spinal cord shocked [sic] through with a necrotic tumor also being pushed in on by two osteophytes to have not had immediate neurological symptoms and deficit on the spot and if not on the spot within a few minutes. It would be medically impossible for that cord in that condition given a violent whiplash to not have decompensated into deficit on the spot, it's not medically possible. (Tr. pp. 286-288).

Further on, Dr. Derby said:

> A Michael Santoro had a naturally occurring astrocytoma centering on the cervical spinal cord which

had been there for a long, long time, one portion of which at C3-C4 abruptly escalated, intrinsically, naturally, spontaneously, biologically in and of itself without reference to any external event into an accelerated much more malignant phase of growth which started literally breaking down the spinal cord and did so piece by piece. The tumor had not caused symptoms all that earlier time to our knowledge because at that point it was infiltrative and in a less aggressive form. It is when it spontaneously broke in and of itself into this more aggressive highly malignant form that the symptoms began and the whole thing was indigenous to the spinal cord without reference to anything else. (Tr. p. 304).

VI

This record presents the unenviable task of resolving the ultimate issue from conflicting probative evidence. It is an arguable case to which the rule that doubt concerning evidentiary conflicts should be resolved in favor of the Claimant is deemed applicable.

Although Dr. Derby's resposne, above, to the hypothetical question was based on the assumption that neck pain had been present and persisted since the day of the accident, he was most emphatic and convinced, partially on the basis of the reports of Drs. Visconti and Greifinger, that the Claimant never suffered a neck injury.

As mentioned above, there is nothing in Dr. Greifinger's report to support the contention that the Claimant's neck pain was something new which appeared after he was discharged by Dr. Visconti as "cured." Insofar as Dr. Visconti's reports are concerned, they are dismissed as probative evidence of a full medical evaluation of the Claimant's symptoms and overall condition and are looked upon as no more than a perfunctory billing for office visits. Any reliance on them in formulating an argument or opinions is believed to be of little value.

Other than that, Dr. Derby's testimony provided a high level of persuasion and there is some merit in the Employer's position, taking into account the differences it pointed to in Dr. Yazdan's testimony that, in effect, Dr. Yazdan's opinion is a gratuitous "theory" to put the Claimant's case in the best light.

However, there is no doubt that the Claimant had an accident and although there is no reliable evidence to determine whether the Claimant actually sustained a violent whiplash injury, there is also no evidence as to what really happened in the accident, but it is found that something did happen and that as a result the Claimant sustained some type of traumatic insult to or around his neck of which he complained of pain from the very beginning which Dr. Yazdan believed and relied on for his opinion on causal connection. That opinion is anchored in his experience as a hands-on neurosurgeon.

In his direct testimony, Dr. Yazdan likened the Claimant's slow-growing tumor to the existence of an underlying degenerative disease:

> "We have two conditions in this gentleman which existed, most likely, prior to this accident. One was a slight degree of osteoarthritis or spondylosis, which is quite common. You have it, I have it, everybody over 35 or 40 has a little bit of it. We live with it for many, many years, 20 or 30 years. Nothing happens until something happens, either accident or a fall or a whiplash, or whatever you want to call it. Then the individual becomes symptomatic, then he comes to us, then we take the X-ray, then we naturally don't see anything except a slight degree of osteoarthritis and then, we tell the patient: 'Yes, you do have some arthritis.' And immediately, he says: 'Well, I have no problem.' He get very, very upset. He says: 'I only have problem since I have this accident. How can you tell me I have this problem before?' And

this is a very common problem we get in the office and in the hospital and also it's a leg—legal problem."

"The answer is very simple, that you have a dormant problem which may be spondylosis or anything else and it's silent, at least in that particular moment, in time. Then something happens which aggravates the tissues in or around that region that you are talking about.

(pause)

When that happens, the area becomes swollen and inflamed. If we think just a simple sprain and a strain, these patients are symptomatic sometimes more than even a year, they get headache and neck pain, it leads to chronic myocytis and it started with a sprain or a strain to begin with. Sometimes, they get a pain down the arm if they have a spondylosis associated with it.

"Now, in this gentleman, we had additional dormant problem which was this tumor within the cord, that this was an active man, he was doing very, very ha[r]d work, I understand, and he was completely asymptomatic until this thing happened, until this accident. The trauma of the whiplash, acceleration and deceleration, did cause swelling around the parenchymatous or the tissue around the tumor, in addition of spraining and straining the neck and the ligaments around this spondylotic spine and the nerve root.

So he had a mixture of symptoms which were all precipitated one way or another by this accident.

Now, we are not saying that it was caused by the accident, so that's where the controversy is. You know, people think when somebody is saying about their spondylosis or the astrocytoma was caused by trauma. Well, that's not true. We know that's not true. Trauma does not cause neoplasm, any kind of neoplasm, we know that.

(pause)

Trauma, on one shot deal doesn't even cause a spondylosis. Although in multiple trauma and grinding does cause that.

However, go back in—go back to astrocytoma, this tumor or this lesion initially was dormant there and he might have gone another 15 or 20 years before he would become symptomatic.

(pause)

But this injury expedited the whole situation."

Q In other words, doctor, if I understand you correctly, the injury did not cause the tumor to grow.

A No.

Q It did cause edema, apparently.

A Yes, yes.

(Tr. pp. 48-50)

When pressed on cross-examination concerning his opinion and whether the tumor activated by itself, he responded:

> Yes, it is possible if we assume this is the only case in the literatutre, but having seen the behavior of these tumors and having seen many, many dormant problems in the patients who become—many all—they all manifest themselves after the trauma or become symptomatic, makes an expert or anybody who has got some experience, think that yes, there is a correlation between the precipitation of the symptoms and trauma.
>
> *If this was the only case in literature, I would go along with you, but that's not the case. We do see this quite often.* (Underlining added). Not necessarily with the spine—astrocytomas of the cord. I get a patient comes with a concussion of the brain, I do a CAT scan, there's a meningioma. Now all of a sudden, this patient is symptomatic. Sure we know that the concussion didn't cause

> the meningioma, but definitely, the concussion caused some edema around the tumor, which made the patient symptomatic. So how can you say there's no relationship? (Tr. pp. 173-174).

Although Dr. Yazdan admitted that he did not see edema during surgery or mention it in his operative report, he explained that edema is not something one sees under a microscope as he used in the operation. Dr. Derby conceded that edema does accompany a tumor, at least some of the time (Tr. p. 354), but edema never causes anything (Tr. p. 337). However, his view [without more personal enlightenment and perhaps a better understanding here] does not square with the impression of Dr. Friedman who examined the Claimant August 20, the day before surgery. Of relevance and significance is that part where he says "At this point it appears that both of his intercostal and phrenic nerves *are affected*, possibly just by edema or perhaps this is permanent . . ." (underlining added).

That the nerves can be affected by edema, according to Dr. Friedman, or that the function of the nerves may be reacting to the effect of edema on them, adds credence to Dr. Yazdan's position.

The type of the Claimant's underlying neoplasm poses one of the greatest difficulties in resolving the basic issue in this case. It seems evident or reasonable to acknowledge that the causes and the factors controlling many malignancies are still obscure and under research. Added to that, as this record shows, is the problem that persons invaded by astrocytomas are extremely uncommon. Dr. Derby testified that the disease is not known to medical science to be caused or aggravated by trauma. (Tr. p. 305). However, there is nothing in this record to indicate whether any statistical studies have been done in that area. Further, Dr. Yazdan's position is based primarily on the edema resulting from trauma rather than trauma directly, and death attributed to edema has been diagnosed. *Howell v.*

Einbinder, 350 F.2d 442 (D.C. Cir. 1965). The problem is further complicated by the relationship of the disease to the host. As Dr. Yazdan pointed out one can't generalize tissue reaction or responses to trauma. (Tr. p. 130-134)

Despite the inconsistent or contradictory testimony, Dr. Yazdan did not waiver from his basic position that there is a history of neck pain traceable to the Claimant's job-related accident which precipitated his subsequent disability and death. The record, for the reasons discussed, has been determined to establish an unbroken chain of events supporting a finding of causally-related neck pain. The alternative is to conclude on the strength of Dr. Derby's expertise that the occurrence of the abrupt escalation of the underlying astrocytoma and the job-related accident was purely fortuitous without any relationship one to the other. In view of this record, acceptance of the Employer's position would be inconsistent with the purposes and policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant.

Upon consideration of the record as a whole, it is found and concluded that the Claimant's disability and death is causally related to his accident on July 23, 1985.

ORDER

The Employer shall:

1. Pay compensation to the Claimant's eligible survivors for total disability from August 3, 1985, to March 11, 1986, and death consistent with the applicable provisions of the Act and the regulations.

2. Pay and reimburse those entitled to benefits all medical and other related costs incurred as a result of the Claimant's disability and death as may be required by the applicable provisions of the Act and regulations.

3. Pay all interest and penalties, if any, in accordance with the applicable provisions of the Act and regulations.

/s/ Aaron Silverman

AARON SILVERMAN
Administrative Law Judge

Dated: Nov. 22, 1988
Washington, DC

☆ U S GOVERNMENT PRINTING OFFICE 1994—301-157/86006

Supreme Court, U.S.
FILED
FEB 28 1994

No. 93-744

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

EDWIN S. KNEEDLER
Deputy Solicitor General

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD C. DUMONT
Assistant to the Solicitor General

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

In adjudicating claims for benefits under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act, the Department of Labor applies a "true doubt" rule, under which doubts on factual issues are resolved in favor of a claimant when the evidence is otherwise in equipoise. The question in these cases is whether use of the "true doubt" rule contravenes the Department's own regulations or Section 7(c) of the Administrative Procedure Act.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the captions, Andrew Ondecko was the claimant and a party to the proceedings below in *Greenwich Collieries*, and Pasqualina Santoro was the claimant and a party to the proceedings in *Maher Terminals*. A separate petition for a writ of certiorari filed by Mrs. Santoro, No. 93-474, and a cross-petition filed by Maher Terminals, Inc., No. 93-666, are pending before this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement:	
A. *Greenwich Collieries* v. *Director, OWCP*	3
B. *Maher Terminals, Inc.* v. *Director, OFCP*	8
Summary of argument	14
Argument:	
I. The "true doubt" rule is a reasonable implementation of the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act	18
A. The "true doubt" rule embodies a policy judgment of the sort routinely made by legislatures, agencies and courts in allocating the risk of non-persuasion in various litigation contexts	18
B. Application of the "true doubt" rule is a longstanding and reasonable implementation of the LHWCA and furthers the policies underlying that Act	22
C. Application of the "true doubt" rule is an appropriate implementation of the BLBA, and rests in part on a reasonable interpretation of the Secretary's own regulations under that Act	26
II. The "true doubt" rule does not contravene Section 7(c) of the Administrative Procedure Act	33
A. Section 7(c) imposes only a burden of production, which a claimant must meet before the "true doubt" rule may be applied	34
B. Adjudications under the BLBA and the LHWCA are not, in any event, governed by section 7(c)'s ~~the~~ "burden of proof" provision	42
Conclusion	47
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Abbott v. *Louisiana Ins. Guar. Ass'n*, 889 F.2d 626 (5th Cir. 1989), cert. denied, 494 U.S. 1082 (1990) 25
Alameda County Training & Employment Bd. v. *Donovan*, 743 F.2d 1267 (9th Cir. 1984) 40
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 20
Avondale Indus., Inc. v. *Director, OWCP*, 977 F.2d 186 (5th Cir. 1992) 21
Avondale Shipyards, Inc. v. *Kennel*, 914 F.2d 88 (5th Cir. 1990) 14, 23
Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 20
Bath Iron Works Corp. v. *White*, 584 F.2d 569 (1st Cir. 1978) 14
Betz v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. 805 (1981) 18, 33
Bonessa v. *United States Steel Corp.*, 884 F.2d 726 (3d Cir. 1989) 27
Bowen v. *Yuckert*, 482 U.S. 137 (1987) 21
Bumble Bee Seafoods v. *Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980) 21
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 22
Collins v. *Old Ben Coal Co.*, 861 F.2d 481 (7th Cir. 1988) 32
Concrete Pipe & Prods., Inc. v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) .. 19, 20
Darby v. *Cisneros*, 113 S. Ct. 2539 (1993) 38
Davis v. *Director, OWCP*, 936 F.2d 1111 (10th Cir. 1991) 21
Dazzio v. *FDIC*, 970 F.2d 71 (5th Cir. 1992) 40
Del Vecchio v. *Bowers*, 296 U.S. 280 (1935) 10, 36
Director, OWCP v. *Alabama By-Prods. Corp.*, 560 F.2d 710 (5th Cir. 1977) 44
Director, OWCP v. *Bivens*, 757 F.2d 781 (6th Cir. 1985) 44
Director, OWCP v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977) 44

Cases—Continued: Page

Environmental Defense Fund, Inc. v. *EPA*, 548 F.2d 998 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977) 21, 39-40
Environmental Defense Fund, Inc. v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) 45
F.H. McGraw & Co. v. *Lowe*, 145 F.2d 886 (2d Cir. 1944) 23, 25
Fidelity & Casualty Co. v. *Burris*, 59 F.2d 1042 (D.C. Cir. 1932) 11, 14, 23, 25
Freeman United Coal Mining Co. v. *OWCP*:
988 F.2d 706 (7th Cir. 1993), petition for cert. pending, No. 93-935 ..... 6, 14, 27, 28, 39
999 F.2d 291 (7th Cir. 1993) 29
Friend v. *Britton*, 220 F.2d 820 (D.C. Cir.), cert. denied, 350 U.S. 836 (1955) 23
Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) 20, 25
General Ship Serv. v. *Director, OWCP*, 938 F.2d 960 (9th Cir. 1991) 21
Greer v. *Director, OWCP*, 940 F.2d 88 (4th Cir. 1991) 27
Grizzle v. *Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993) 26
Grogan v. *Garner*, 498 U.S. 279 (1991) 36
Harman Mining Co. v. *Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987) 8
Hazardous Waste Treatment Council v. *EPA*, 886 F.2d 355 (D.C. Cir. 1989), cert. denied, 498 U.S. 849 (1990) 31, 40
Jones v. *Director, OWCP*, 977 F.2d 1106 (7th Cir. 1992) 23
Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973) 19, 22, 42
Kowalchick v. *Director, OWCP*, 893 F.2d 615 (3d Cir. 1990) 27
Lavine v. *Milne*, 424 U.S. 577 (1976) 19
Lesicko v. *Peabody Coal Co.*, 1 Black Lung Rep. (MB) 1-87 (Ben. Rev. Bd.), aff'd on reconsideration, 1 Black Lung Rep. 1-276 (Ben. Rev. Bd. 1977), rev'd on other grounds, 581 F.2d 121 (7th Cir. 1978) 27

Cases—Continued: Page

Lessar v. *C.F. & I. Steel Corp.*, 3 Black Lung Rep. (MB) 1-63 (Ben. Rev. Bd.) 3
Lorillard v. *Pons*, 434 U.S. 575 (1978) 25
Maine v. *United States Dep't of Labor*, 669 F.2d (1st Cir. 1982) 40
Medina v. *California*, 112 S. Ct. 2572 (1992) 19, 33
Merritt v. *United States*, 960 F.2d 15 (2d Cir. 1992) 40
Mount Healthy City Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 20
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 3, 4, 30, 31, 32
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) .. 25
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 22
NLRB v. *Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966) 45, 47
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983) 7, 12, 16, 20, 22, 31, 35, 40, 41, 42
Noble Drilling Co. v. *Drake*, 795 F.2d 478 (5th Cir. 1986) 23
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) 25
Old Ben Coal Corp. v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975) 21, 40
Panhandle Producers & Royalty Owners Ass'n v. *Economic Regulatory Admin.*, 822 F.2d 1105 (D.C. Cir. 1987) 45
Parsons Corp. v. *Director, OWCP*, 619 F.2d 38 (9th Cir. 1980) 14, 23
Patton v. *Director, OWCP*, 763 F.2d 553 (3d Cir. 1985) 44
Pauley v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991) 28
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 28
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 26
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 20

Cases—Continued: Page

Provance v. *United States Steel Corp.*, 1 Black Lung Rep. 1-483 (Ben. Rev. Bd. 1978) 19, 27
Rivers v. *Schweiker*, 684 F.2d 1144 (5th Cir. 1982) 21
Skukan v. *Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), petition for cert. pending, No. 93-964 ..... 27, 30, 31, 40
Southern Pac. Co. v. *Sheppeard*, 112 F.2d 147 (5th Cir. 1940) 23
Southern S.S. Co. v. *Norton*, 101 F.2d 825 (3d Cir. 1939) 23
Stearns Elec. Paste Co. v. *EPA*, 461 F.2d 293 (7th Cir. 1972) 45
Steadman v. *SEC*, 450 U.S. 91 (1981) 12, 17, 22, 35, 47
Stinson v. *United States*, 113 S. Ct. 1913 (1993) .. 30, 31-32
Summers v. *Tice*, 199 P.2d 1 (Cal. 1948) 20
Teamsters v. *United States*, 431 U.S. 324 (1977) .. 20
U.S. Indus./Federal Sheet Metal Inc. v. *Director, OWCP*, 455 U.S. 608 (1982) 11, 35-36
U.S. Pipe & Foundry Co. v. *Webb*, 595 F.2d 264 (5th Cir. 1979) 44
Voris v. *Eikel*, 346 U.S. 328 (1953) 25
Ward's Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989) 31
West v. *Director, OWCP*, 896 F.2d 308 (8th Cir. 1990) 44
Woodward v. *Director, OWCP*, 991 F.2d 314 (6th Cir. 1993) 33
Young & Co. v. *Shea*, 397 F.2d 185, on petition for reh'g, 404 F.2d 1059 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969) 23

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551:
5 U.S.C. 551-559 45
5 U.S.C. 554 *et seq.* 44, 2a
5 U.S.C. 554 ..... 43, 47
5 U.S.C. 554(c)(2) 43, 46
5 U.S.C. 556 43
5 U.S.C. 556(d) (§ 7(c)) ..... *passim*, 1a

Statutes and regulations—Continued: Page

5 U.S.C. 557 43
5 U.S.C. 559 45
Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.* 3, 1a
§ 402(b), 30 U.S.C. 902(b) 4
§ 402(f), 30 U.S.C. 902(f) 27
§ 402(f)(1)(A), 30 U.S.C. 902(f)(1)(A) 5
§ 411(c)(1), 30 U.S.C. 921(c)(1) 4
§ 411(c)(2), 30 U.S.C. 921(c)(2) 30
§ 411(c)(4), 30 U.S.C. 921(c)(4) 30
§ 411(c)(5), 30 U.S.C. 921(c)(5) 30
§ 422(a), 30 U.S.C. 932(a) 2, 6, 27, 43, 44, 3a
§ 422(g), 30 U.S.C. 932(g) 8
§ 424(b), 30 U.S.C. 934(b) 8
§ 507, 30 U.S.C. 956 43
§ 508, 30 U.S.C. 957 27
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 3
§ 7(c)(2), 33 U.S.C. 907(c)(2) 26
§ 7(d)(4), 33 U.S.C. 907(d)(4) 26
§§ 19-21, 33 U.S.C. 919-921 27
§ 19(c), 33 U.S.C. 919(c) 47
§ 19(d), 33 U.S.C. 919(d) 2, 24, 43, 44, 47, 2a
§ 20(a), 33 U.S.C. 920(a) 9, 10, 11, 35
§ 20(d), 33 U.S.C. 920(d) 10, 11
§ 21(b), 33 U.S.C. 921(b) 24
§ 21(c), 33 U.S.C. 921(c) 6
§ 23(a), 33 U.S.C. 923(a) 2, 23, 24, 27, 43, 46, 2a
Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1261 ..... 24, 47
§ 15, 86 Stat. 1261 24
§ 15(e), 86 Stat. 1262 24
26 U.S.C. 9501(d)(1)(A) 8
29 U.S.C. 160(c) 42
38 U.S.C. 5107 21
20 C.F.R.:
Pt. 702:
Section 702.410(c) 26

Regulations—Continued: Page

Pt. 718:
Section 718.1(a) 29
Section 718.2 6
Section 718.3(c) 2, 29, 30, 31, 44, 1a
Sections 718.201-718.206 30
Section 718.203(a) 4
Section 718.203(b) 4
Section 718.204(b) 5
Sections 718.204(c)(1)-(4) 5
Section 718.402 33
Section 718.403 ..... 2, 3, 7, 30, 31, 2a
Section 718.409(a)(1) 32
Pt. 725:
Section 725.2 6
Section 725.4(a) 6, 44
Section 725.409(a)(1) 33
Section 725.410 4
Section 725.414(a) 33
Section 725.481 5
Section 725.421 *et seq.* 4
Section 725.452(a) 2, 44, 3a
Section 725.522(b) 8
Section 725.535(b) 8
Section 725.602 8
Section 725.603 8
Section 725.608 8
Pt. 727:
Section 727.202 6
Section 727.203 6
Section 727.203(a) 31
21 C.F.R. 12.87(d) 21
38 C.F.R. 3.102 21

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947) 38, 46
Black's Law Dictionary (6th ed. 1990) 31
Coal Mine (BLBA) Procedure Manual (Feb. 1980) 27
3 K. Davis, *Administrative Law Treatise* (2d ed. 1978) 40

Miscellaneous—Continued: Page

115 Cong. Rec. 39,996 (1969) 45
118 Cong. Rec. 36,385 (1972) 47
127 Cong. Rec. 9831 (1981) 48
Employment Standards Admin., U.S. Dep't of Labor, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* (1983) 32
Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar 1991* (1992) 33
43 Fed. Reg. 36,826 (1978) 27
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 38, 39, 42
H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) 47
4 J. Stein, *et al., Administrative Law* (1993) 40, 41
9 J. Wigmore, *Evidence* (3d ed. 1940) 19, 31, 36
Longshoremen's and Labor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 97th Cong., 1st Sess. (1981) 48
McCormick on Evidence (E. Cleary ed., 3d ed. 1984) 20, 36
N. Snyder & M. Solomons, *Black Lung—A Study in Occupational Disease Compensation* (1976), *reprinted in Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3133 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. (1976) 28
S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 38, 39, 42
S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 28
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) 24, 25, 47
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 28

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-744

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *Greenwich Collieries* v. *Director, Office of Workers' Compensation Programs* (Pet. App. 1a-16a) is reported at 990 F.2d 730. The decision of the Benefits Review Board

in that case (Pet. App. 17a-23a) is unreported, as is the decision of the administrative law judge (Pet. App. 24a-46a).

The opinion of the court of appeals in *Maher Terminals, Inc.* v. *Director, Office of Workers' Compensation Programs* (J.A. 8-24) is reported at 992 F.2d 1277. The decision of the Benefits Review Board in that case (J.A. 25-33) is unreported, as are the decisions of the administrative law judge (J.A. 34-56).

JURISDICTION

The court of appeals entered its judgment in *Greenwich Collieries* on March 23, 1993, and in *Maher Terminals* on April 19, 1993. The court denied petitions for rehearing in both cases on June 25, 1993. Pet. App. 47a-50a. On September 15, 1993, and October 18, 1993, Justice Souter extended the time for filing a petition for a writ of certiorari in both cases, first to October 25, 1993, and then to November 10, 1993. The petition in both cases was filed on November 10, 1993, and granted on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d); Sections 19(d) and 23(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(d) and 923(a); Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a); and relevant provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act (20 C.F.R. 718.3(c), 718.403, and 725.452(a)) are reprinted in pertinent part at App., *infra*, 1a-4a.

STATEMENT

These cases concern the validity of the "true doubt" rule, a principle of adjudication that the Department of Labor has for many years applied in resolving benefits claims under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* The rule provides that when evidence submitted by the claimant and by the party opposing an award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant. In *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987), this Court specifically noted, without any expression of disapproval, that "[t]he Benefits Review Board (BRB) 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.'" *Id.* at 144 n.12 (quoting *Lessar* v. *C.F. & I. Steel Corp.*, 3 Black Lung Rep. (MB) 1-63, 1-68 (Ben. Rev. Bd. 1981)); see also 484 U.S. at 156-157 n.29; Pet. App. 4a, 19a & n.3. Nonetheless, in the cases before the Court, the court of appeals held that application of the "true doubt" rule is inconsistent with this Court's decision in *Mullins Coal*, as well as with one of the Department's own regulations implementing the BLBA (20 C.F.R. 718.403) and with Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

A. *Greenwich Collieries* v. *Director, OWCP*

1. Andrew Ondecko, the claimant in *Greenwich Collieries*, worked as a coal miner for 31 years before applying for disability benefits under the BLBA. Pet. App. 3a. The Department's Office of Workers' Compensation Programs (OWCP) initially denied benefits, and Ondecko requested a hearing before an ad-

ministrative law judge (ALJ). See 20 C.F.R. 725.410, 725.421 *et seq.* The ALJ determined that Ondecko had pneumoconiosis and was totally disabled by that disease, and she awarded benefits.[1] Pet. App. 41a, 44a.

In finding the existence of pneumoconiosis, the ALJ considered 33 x-ray interpretations by five highly qualified experts.[2] Pet. App. 40a-41a. One of those experts read five x-rays as positive for the disease; the others read the same and different films as negative. *Ibid.* The ALJ concluded, however, that "the fact that at least one [expert] repeatedly found evidence of pneumoconiosis [was] significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations." *Id.* at 41a. Because "[t]rue doubt is to be resolved in favor of the Claimant," the ALJ found that Ondecko had established the existence of the disease. *Ibid.*

In finding that the claimant was totally disabled by pneumoconiosis, the ALJ considered eight medical

[1] The ALJ also found that the disease arose out of coal mine employment. See 30 U.S.C. 902(b) (definition of pneumoconiosis); 20 C.F.R. 718.203(a). That finding was based on an unrebutted statutory presumption of causation available to any miner who has had at least ten years of coal mine employment, and it was not challenged before the Benefits Review Board or the court of appeals. Pet. App. 41a-42a; see 30 U.S.C. 921(c)(1); 20 C.F.R. 718.203(b).

[2] Although there were 44 x-ray interpretations in the record, the ALJ considered the 33 provided by those physicians with the best objective qualifications—*i.e.*, those who were both Board-certified in radiology and specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis ("B-readers"). Pet. App. 40a; see *id.* at 20a n.4; *Mullins Coal*, 484 U.S. at 145 n.16.

opinions, four of them supporting a finding of disability and four supporting a finding that the claimant was not disabled.[3] Pet. App. 43a. The ALJ recognized the qualifications of the four physicians who found no disability, but gave special consideration to the contrary opinion of the physician who had treated Ondecko for more than 20 years. *Id.* at 43a-44a. The ALJ concluded that "the fact that the Claimant's treating physician consider[ed] him totally disabled * * * raise[d] true doubt in face of the Employer's experts[']opinions," and she again resolved that doubt in favor of the claimant. *Id.* at 44a.

2. Greenwich Collieries appealed to the Department's Benefits Review Board, see 20 C.F.R. 725.481, which affirmed the ALJ's determination. Pet. App. 17a-23a. The Board noted that negative x-ray interpretations are "not a trustworthy indicator of the absence of pneumoconiosis," and it agreed that the ALJ was not required to accept the negative interpretations solely because there were more of them. *Id.* at 19a. The Board then concluded that the ALJ had "properly discussed and weighed all relevant medical evidence" on the pneumoconiosis issue, and that because she "found the positive and negative interpretations by [expert] physicians * * * to be equally probative," she had properly resolved the question in

[3] A black lung claimant may establish total disability using pulmonary function tests, blood gas tests, proof of a characteristic heart condition, or the opinion of a physician exercising "reasoned medical judgment." 20 C.F.R. 718.204(c)(1)-(4). Ondecko relied only on medical opinions. Pet. App. 42a-44a. Under the BLBA, "total disability" means inability of a miner to do his usual coal mine work or work comparable to it. 30 U.S.C. 902(f)(1)(A); 20 C.F.R. 718.204(b). Ondecko's usual coal mine work involved dragging pipes that weighed up to 150-200 pounds. Pet. App. 42a n.10.

Ondecko's favor under the "true doubt" rule. *Id.* at 19a-20a & n.3.

On the question of disability, the Board noted that the ALJ had "stated her basis for finding the evidence [on each side] equally probative," and it concluded that "her discussion of the medical evidence * * * supports the inference" that she properly considered all of the conflicting evidence. The Board declined to "reweigh the evidence or substitute its inferences" for those of the ALJ. Pet. App. 22a.

3. On judicial review pursuant to 33 U.S.C. 921(c) (as incorporated from the LHWCA into the BLBA by 30 U.S.C. 932(a)), the court of appeals vacated and remanded. Pet. App. 1a-16a. First, the court read this Court's decision in *Mullins Coal* to require that a claimant prove the existence of pneumoconiosis by a preponderance of the evidence. *Id.* at 5a-6a.[4] Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court of appeals held that application of the rule is inconsistent with *Mullins Coal.* It explicitly disagreed in this regard with the decision in *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 711-712 (7th Cir. 1993) (per curiam), petition for cert. pending, No. 93-935, which construed *Mullins Coal* to support use of the "true doubt" rule to prove pneumoconiosis. Pet. App. 6a & n.3.

[4] *Mullins Coal* construed the Department of Labor's "interim presumption" regulation, 20 C.F.R. 727.203, which applied to claims that were filed before the Department's permanent regulations became effective. See 20 C.F.R. 727.200. The permanent regulations apply to all claims, including the one at issue in *Greenwich Collieries*, filed after March 31, 1980. See 20 C.F.R. 718.2. The procedural regulations set forth in 20 C.F.R. Pt. 725 apply to all black lung claims filed with the Department of Labor. See 20 C.F.R. 725.2, 725.4(a).

Second, the court held that 20 C.F.R. 718.403, which provides generally that "[t]he burden of proving a fact alleged in connection with [a BLBA claim] shall rest with the party making such allegations," imposes on the claimant the burden of persuasion with respect to the matters in issue. Pet. App. 8a-11a. The court acknowledged (*id.* at 8a-9a) this Court's conclusion in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983), that similar language in Section 7(c) of the APA, 5 U.S.C. 556(d), imposes only a burden of production, rather than persuasion. But it found the difference between the terms "burden of proving" (in Section 718.403) and "burden of proof" (in Section 7(c)) sufficient to distinguish this case from *Transportation Management* and to require that the former be construed to mean "burden of persuasion." Pet. App. 9a-11a.

As a result of its construction of 20 C.F.R. 718.403, the court found it unnecessary to address whether Section 7(c) of the APA independently requires the Secretary or the BRB to allocate the burden of persuasion to the claimant. Pet. App. 11a & n.4. The court did conclude, however, that Section 7(c) requires whichever party bears the burden of persuasion to establish each relevant point by a preponderance of the evidence. Pet. App. 12a-13a. Because the "true doubt" rule allows the claimant to prevail when the evidence is in equipoise, the court concluded that use of the rule violates Section 7(c) of the APA.[5]

[5] The court noted that statutory provisions enacted subsequent to the APA may be held to supersede or modify the relevant provisions of that statute if they do so expressly, but it concluded that the BLBA does not have that effect. Pet. App. 13a n.5, 15a.

Pet. App. 13a-15a. The court thought it unclear, however, whether in the absence of the "true doubt" rule the ALJ would have found Ondecko's evidence sufficient to meet his burden of persuasion under the preponderance of the evidence standard, and it therefore remanded the case to allow the ALJ to make that determination. *Id.* at 15a-16a.[6]

B. *Maher Terminals, Inc.* v. *Director, OWCP*

1. Michael Santoro sustained a work-related back and neck injury on July 23, 1985, while employed by respondent Maher Terminals, Inc. J.A. 10. After having been treated and released to return to work, Santoro experienced increasing pain and numbness; by August 15, he was unable to get out of bed. *Ibid.* An examining physician at the hospital reported spinal cord swelling and irregularity, and a neurosurgeon, after reviewing test results and doing a follow-up examination, suspected a tumor in the spinal cord. J.A. 10-11, 27. Surgery in fact disclosed such a tumor, which was identified as an astrocytoma, a

[6] We have been informed that on November 17, 1993, the Pennsylvania Department of Labor and Industry's Bureau of Workers' Compensation found Ondecko partially disabled due to pneumoconiosis and awarded him benefits for the period beginning October 1, 1993. The state award will largely (although not entirely) offset any federal black lung benefits that would otherwise be payable to Ondecko after that date, but it will not affect federal benefits for prior periods. See 30 U.S.C. 932(g); 20 C.F.R. 725.535(b); *Harman Mining Co.* v. *Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987). The Director has paid those benefits to Ondecko since the ALJ's award, see 26 U.S.C. 9501(d)(1)(A); 20 C.F.R. 725.522(b), and therefore retains a direct monetary interest in having the award affirmed so that he may recoup the payments made, plus interest, from respondent Greenwich Collieries. See 30 U.S.C. 934(b); 20 C.F.R. 725.602, 725.603, 725.608.

rare form of nerve cancer. J.A. 11, 27. Santoro became paraplegic and mute, and he died in March 1986 from cardiac arrest caused by the astrocytoma. *Ibid.*

Santoro's widow, the claimant in *Maher Terminals* and petitioner in No. 93-474, filed a claim under the LHWCA, alleging that the July 1985 injury had rendered her husband totally disabled and caused his death. J.A. 40, 46-47. She relied primarily on reports and testimony by the neurosurgeon concluding that trauma from the injury had produced swelling, which significantly hastened Santoro's disability and death by aggravating a tumor that was previously dormant and might have remained so for many years. J.A. 42, 47-48. The company's expert, a neurologist and pathologist who reviewed relevant records but never actually examined Santoro, testified that it was "medically impossible" that Santoro had suffered a severely traumatic neck injury in his accident at work. He was of the view that the tumor had erupted spontaneously, destroying the spinal cord "without reference to any external event." J.A. 42-43, 49-50.

The ALJ found that Santoro's widow had established both the existence of his injury and circumstances at his work that could have caused the injury. J.A. 41. Under Section 20(a) of the LHWCA, 33 U.S.C. 920(a),[7] that showing raised a presumption of coverage and shifted to the employer the burden of producing "substantial evidence to the contrary"

[7] Section 20(a) of the LHWCA provides that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this chapter." 33 U.S.C. 920(a).

—*i.e.*, "evidence specific and comprehensive enough to sever the potential connection between the resultant impairment and work environment." J.A. 41. The ALJ then concluded that the testimony of the employer's expert was sufficient to rebut the statutory presumption, and proceeded to consider the case "on the basis of the record as a whole." J.A. 43.

After thoroughly reviewing the evidence, J.A. 43-55, the ALJ credited the opinion of the claimant's expert because it was "anchored in his experience as a hands-on neurosurgeon," but noted that some parts of his testimony appeared "inconsistent or contradictory" (J.A. 48-51, 54-55); similarly, he found the employer's expert highly qualified and persuasive (J.A. 42, 51), but rejected his conclusion that Santoro had suffered no neck injury (J.A. 50-51) and questioned his opinion regarding the presence and possible effect of post-traumatic swelling (J.A. 54). On balance, the ALJ found the evidence of causation conflicting and equally probative; deeming the issue "arguable" and "debatable" even after careful weighing of the evidence, the ALJ invoked the "true doubt" rule and awarded benefits to the claimant. J.A. 50-55; see also *id.* at 34 (order denying rehearing).

2. The Benefits Review Board affirmed. J.A. 25-33. Respondent Maher Terminals argued before the Board that application of the "true doubt" rule in effect resurrected the presumption of causation initially provided by Section 20(a) of the LHWCA, 33 U.S.C. 920(a), whereas this Court held in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935), that a similar presumption "falls out of the case" after it is successfully rebutted by the employer. See J.A. 29.[8]

[8] *Del Vecchio* construed the presumption in Section 20(d) of the LHWCA "[t]hat the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. 920(d). This Court has assumed that the Section 20(a) presumption "is of the same nature." *U.S. Indus./Federal Sheet Metal Inc.* v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982).

The Board rejected that argument, holding that the "true doubt" rule is consistent with *Del Vecchio* because it comes into play only after the ALJ has weighed all of the evidence (without regard to the rebutted statutory presumption) and found it evenly balanced. *Ibid.* The Board noted that the "true doubt" rule is "well established" under the LHWCA, and declined to depart from it in this case. *Ibid.* After reviewing the evidence and the ALJ's opinion, J.A. 30-32, the Board found no error in the ALJ's analysis or his application of the "true doubt" rule, and it therefore affirmed the award of benefits. *Id.* at 32.

3. The same panel of the Third Circuit that decided *Greenwich Collieries* also vacated the Board's decision in *Maher Terminals*. J.A. 8-24. The court agreed with the Board that the ALJ had not relied improperly on the statutory presumption in Section 20(a). J.A. 13. The court also recognized that other courts had applied the "true doubt" rule under the LHWCA. J.A. 11-12, 22-23. It found the genesis of the rule in the decision 60 years earlier in *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932), which grounded the rule in the LHWCA's compensatory purposes. J.A. 12. The court below nonetheless dismissed the *Burris* rationale as having "no logical basis in the law." *Ibid.* The court further held in this case (unlike in *Greenwich Collieries*) that Section 7(c) of the APA not only specifies the standard of proof (preponderance of the evidence) that

must be met by whichever party bears the burden of persuasion on a particular issue, but also affirmatively allocates the burden of persuasion to the party seeking benefits under the LHWCA. J.A. 17-18. Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court concluded that its application violates the APA. J.A. 22, 24.

The court of appeals acknowledged (J.A. 15) this Court's conclusion in *Transportation Management*, 462 U.S. at 404 n.7, that Section 7(c) of the APA "determines only the burden of going forward, not the burden of persuasion." But the court treated that conclusion as "dicta" (J.A. 15), apparently because the specific factual context in which the burden-shifting issue arose in *Transportation Management* involved an affirmative defense, rather than the underlying unfair labor practice charge. The court distinguished the affirmative defense situation as a "logical exception" to what it considered to be a general rule under the APA that a claimant must bear the burden of persuasion "on the subject of the litigation." J.A. 21-22.

Similarly, the court of appeals concluded that despite *Transportation Management*'s unqualified language concerning the effect of Section 7(c), this Court had interpreted only the first sentence of that section, which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." J.A. 14 (quoting 5 U.S.C. 556(d)). The court pointed out that in the earlier case of *Steadman* v. *SEC*, 450 U.S. 91, 98, 102 (1981), this Court had construed the third sentence of Section 7(c) to provide that administrative determinations governed by the APA be made in accordance with a "preponderance of the evidence"

standard.[9] J.A. 15-16. Although it recognized that "*Steadman*, standing alone, does not allocate the burden of persuasion, but rather defines its scope as a preponderance of the evidence," the court reasoned that Section 7(c) prohibits issuance of an order except on a preponderance of the evidence. J.A. 17. Because it viewed a benefits claimant as the party who "seeks to change the status quo," J.A. 18, the court concluded that Section 7(c) prohibits any change in the status quo based on the "true doubt" rule, because in that situation the claimant, by definition, has not supported her position by a preponderance of the evidence. J.A. 22. In doing so, the court "concede[d]" that the legislative history of Section 7(c), "taken together with *Steadman*, suggests that the party who seeks a denial of relief is *also* required by section 7(c) to sustain such denial by a preponderance of the evidence." J.A. 19. The court declined, however, to draw from that proposition the conclusion that Section 7(c) of the APA does not itself allocate the burden of persuasion when the evidence supporting an award of benefits and the evidence supporting a denial are in equipoise. Instead, the court concluded that the burden of persuasion must be on the party initiating the proceeding on all issues raised by that party. J.A. 19.

The court of appeals explicitly rejected decisions of the First, Fifth, Ninth and District of Columbia Circuits upholding the "true doubt" rule under the LHWCA, remarking only that those courts had "not

---

[9] The third sentence of Section 7(c) provides that "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

seriously considered the applicability of the APA to the question at hand." J.A. 22-23 (citing *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88 (5th Cir. 1990) (per curiam); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Bath Iron Works Corp.* v. *White*, 584 F.2d 569 (1st Cir. 1978); *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042 (D.C. Cir. 1932)). The court recognized that the opinion in *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706 (7th Cir. 1993) (per curiam), petition for cert. pending, No. 93-935, did consider the effect of the APA, and upheld application of the "true doubt" rule under the BLBA. But the court declined to follow *Freeman*, believing it to be inconsistent with this Court's decision in *Mullins Coal* and with the panel's own previous decision in *Greenwich Collieries*.

As in *Greenwich Collieries*, the court thought it unclear whether, in the absence of the "true doubt" rule, the ALJ would have found Mrs. Santoro's evidence sufficient to satisfy her burden of persuasion. It therefore vacated the decision of the Benefits Review Board with directions to remand the case to the ALJ to make that determination. J.A. 24.

SUMMARY OF ARGUMENT

1. The true doubt rule is a principle of adjudication that allocates the risk of non-persuasion in litigating claims under the LHWCA and the BLBA. Such principles are routinely prescribed by legislatures or adopted by courts for particular situations based on experience, policy, and relevant evidentiary probabilities. Similarly, administrative agencies are free, within the limits set by statute, to allocate the burden of persuasion on particular questions that arise in agency proceedings, and agencies have done

so in a variety of contexts. Here, the Secretary of Labor has determined that once an LHWCA or BLBA claimant has carried the burden of producing competent evidence that is sufficient (if unrebutted) to justify an award of benefits, the party opposing the award should bear not only the burden of producing contrary evidence, but also the ultimate risk that its rebuttal will not persuade the trier of fact, by a preponderance of the evidence, that the claimant is not entitled to an award. That determination by the Secretary is entitled to deference from this Court unless it is unreasonable or inconsistent with some statutory command. It is neither, and it should therefore be upheld.

a. The LHWCA affords considerable flexibility in establishing procedures for adjudicating claims under that Act. The Act itself does not specify which party should bear the ultimate risk of non-persuasion on eligibility for benefits, and for fifty years or more administrators and federal courts reviewing LHWCA claims have applied some variation of the principle now embodied in the "true doubt" rule. Congress amended pertinent provisions of the LHWCA in 1972, without restricting the procedural and evidentiary flexibility afforded adjudicators under the Act or expressing any dissatisfaction with principles such as the "true doubt" rule that had by then become established features of administrative and judicial practice under the Act. Moreover, the assignment of the risk of non-persuasion to employers is reasonable as a matter of policy under the LHWCA, which is a remedial statute intended to provide a vulnerable class of injured employees with a reliable source of compensation, while providing employers not only ample opportunity to contest invalid claims, but general protection from the far larger claims

otherwise available to injured employees under the common law.

b. Many of the same considerations support application of the "true doubt" rule in adjudicating claims under the BLBA. The BLBA contains broad grants of regulatory and procedural authority, and no provision restricting the administrative allocation of the burden of persuasion. Also as in the case of the LHWCA, use of the "true doubt" rule is consistent with congressional intent, and constitutes a reasonable implementation of the remedial and protective purposes of the Act. Moreover, the Secretary's current regulations implementing the BLBA embody the same balance that is reflected in the "true doubt" rule between requiring claimants to adduce sufficient evidence of eligibility, and giving them the benefit of the doubt in those few cases in which conscientious evaluation leaves the adjudicator unable to conclude that either side has produced a preponderance of the evidence on a particular point. At least in cases to which those regulations apply, application of the "true doubt" rule is grounded not only in a permissible construction of the underlying statute, but in the Secretary's interpretation of his own regulations.

2. a. Contrary to the court of appeals' holding, application of the "true doubt" rule does not conflict with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d). The first sentence of Section 7(c), as interpreted by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983), requires only that the party advocating a particular result bear the burden of *production* with respect to that issue. The third sentence of Section 7(c) likewise does not allocate the burden of persuasion to one party or the other. As interpreted by this Court in *Steadman* v. *SEC*, 450 U.S. 91 (1981), the third sentence requires only that whichever party bears the burden of persuasion on an issue must generally establish its position by a preponderance of the evidence. Read separately and together, the APA, *Steadman*, and *Transportation Management* all permit use of the "true doubt" rule, under which a claimant must bear the burden of producing evidence sufficient (if unrebutted) to support his claim, but the party opposing the claim bears the ultimate burden of persuasion.

The court of appeals acknowledged that the APA and this Court's cases could be harmonized in the manner that we propose, but nevertheless construed Section 7(c) to impose the burden of persuasion on benefits claimants. That construction is unsound. The text of Section 7(c) is silent regarding allocation of the burden of persuasion. Its structure, the history of the APA, and the case law all make clear, however, that Section 7(c) imposes only a burden of production on proponents of agency action. Moreover, the court of appeals' rigid construction, which *requires* agencies to allocate the risk of non-persuasion in the same manner regardless of the statutory context or other circumstances, itself contravenes the flexible policy of the APA, which was not intended to impose undue restrictions on government operations.

b. In any event, whatever restrictions Section 7(c) imposes do not apply to claims adjudications under the LHWCA and the BLBA. The APA applies to BLBA adjudications only by incorporation from the LHWCA, and that incorporation does not apply where the Secretary's regulations provide otherwise. As noted above, the Secretary's current regulations under the BLBA embody the principle

of the "true doubt" rule, and therefore exclude application of any contrary general principle otherwise applicable under the APA. In the case of the LHWCA, the Act's broad grant of power to adjudicate claims without regard to otherwise applicable rules of evidence and procedure authorizes LHWCA adjudicators to apply the "true doubt" rule. Congress expressly provided for LHWCA adjudications to be covered by the APA in 1972, but there is no indication that it intended thereby to revise settled evidentiary rules long applied in resolving LHWCA claims.

ARGUMENT

I. THE "TRUE DOUBT" RULE IS A REASONABLE IMPLEMENTATION OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND THE BLACK LUNG BENEFITS ACT

A. The "True Doubt" Rule Embodies A Policy Judgment Of The Sort Routinely Made By Legislatures, Agencies And Courts In Allocating The Risk Of Non-Persuasion In Various Litigation Contexts

The "true doubt" rule is a principle of adjudication that allocates the risk of non-persuasion in litigating claims under the LHWCA and the BLBA. It does not relieve a claimant of the burden of producing sufficient evidence to justify an award of benefits, and it does not require that a claimant prevail merely because the evidence on a point is in conflict. Nor does it relieve the adjudicator of the obligation to weigh the claimant's evidence against other evidence in the record. See *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981). The rule provides only that when an adjudicator finds the evidence on both sides of a point

evenly balanced (taking account of both its quantity and its quality), so that neither party can fairly be said to have adduced a preponderance of the evidence, the uncertainty should be resolved in favor of the claimant. See, *e.g.*, Pet. App. 19a n.3; *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben. Rev. Bd. 1978). This Court has recognized in other contexts that allocation of the risk of non-persuasion "is merely a question of policy and fairness based on experience in * * * different situations." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)). The administrative answer to that question in these cases—adopted through the "true doubt" rule by those charged with implementing these two complex statutory benefits schemes—is entitled to substantial deference from the courts.

There is nothing pre-ordained about the allocation of the burden of persuasion in any particular civil context. See, *e.g.*, *Keyes*, 413 U.S. at 209-210. A legislature, in fashioning a particular program, may (within broad constitutional limits) impose whatever structure of proof it chooses for resolution of civil disputes arising under the statutory scheme.[10] See *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976); see also *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281-2283 (1993).

---

[10] Even in the context of criminal proceedings, in which due process requires that the government ultimately prove guilt beyond a reasonable doubt, state legislatures retain broad discretion to allocate subsidiary burdens of production and persuasion between the defense and prosecution. See *Medina* v. *California*, 112 S. Ct. 2572, 2577-2579 (1992).

This Court has noted, for example, that where one party is more likely to have information relevant to the facts at issue, it is both traditional and sensible to assign to that party the risk of non-persuasion. *Concrete Pipe*, 113 S. Ct. at 2281; see also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-688 (1946). Similarly, in the absence of a statutory rule, the courts themselves, in adjudicating disputes arising under statutes, the Constitution, or the common law, may assign the burden of persuasion based on an assessment of the policies and evidentiary probabilities involved. See, *e.g.*, *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284-287 (1977); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 244-250 (plurality opinion), 263-279 (O'Connor, J., concurring in the judgment) (1989); *Teamsters* v. *United States*, 431 U.S. 324, 358-362 & n.45 (1977); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 246-248 (1942); *Summers* v. *Tice*, 199 P.2d 1, 3-4 (Cal. 1948); *McCormick on Evidence* § 337 (E. Cleary, 3d ed. 1984); see also *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-247 (1988).

In like fashion, administrative agencies are free, within the limits set by statute, to allocate the burden of persuasion on particular questions that arise in agency proceedings. Section 7(c) of the Administrative Procedure Act (APA) provides generally that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof" in formal agency hearings. 5 U.S.C. 556(d). As discussed below (see pages 34-43, *infra*), however, even where it applies, Section 7(c) imposes "only the burden of going forward, not the burden of persuasion." *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983). Agencies have permissibly allocated the burden of persuasion in

different ways in different situations. See, *e.g.*, *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1003-1005 (D.C. Cir. 1976) (burden of persuasion on registrant in agency proceeding to suspend registered pesticide), cert. denied, 431 U.S. 925 (1977); *Old Ben Coal Corp.* v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 39-40 (7th Cir. 1975) (burden on mine operator in proceeding to determine propriety of summary closure based on imminent danger); *Bowen* v. *Yuckert*, 482 U.S. 137, 146-147 n.5 (1987) (after Social Security disability claimant shows inability to do past work at step four of sequential evaluation process, burden of persuasion shifts to Secretary at step five to show claimant's ability to do other work; Court sustains "allocation of burdens of proof" as "well within the Secretary's 'exceptionally broad authority' under the statute"); *Rivers* v. *Schweiker*, 684 F.2d 1144, 1151, 1154-1155 (5th Cir. 1982) (also discussing allocation of burdens of persuasion under Social Security Act);[11] 38 C.F.R. 3.102 (doubts in veterans' benefits proceedings resolved in favor of claimant), subsequently adopted legislatively by 38 U.S.C. 5107; 21 C.F.R. 12.87(d) (in proceeding to amend or re-

---

[11] Similar rules concerning ability to work apply in determining total disability under the LHWCA and BLBA. See, *e.g.*, *Davis* v. *Director, OWCP*, 936 F.2d 1111, 1115-1116 (10th Cir. 1991) (BLBA); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1328-1329 (9th Cir. 1980) (LHWCA); see also *Avondale Indus., Inc.* v. *Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992); *General Ship Serv.* v. *Director, OWCP*, 938 F.2d 960, 961-962 (9th Cir. 1991) (both concluding that under the LHWCA, a claimant does not have to prove that the employer from whom he seeks benefits is the one responsible for paying them; that employer bears the "burden of proof").

voke order relating to safety or effectiveness of drugs or additives, "burden of proof" falls on party contending that product is safe or effective).

Against this background, there is nothing remarkable about the Secretary's determination that once an LHWCA or BLBA claimant has carried the burden of producing competent evidence that is sufficient (if unrebutted) to justify an award of benefits, the party opposing an award should bear not only the burden of producing contrary evidence, but also the ultimate risk that its rebuttal will not persuade the trier of fact, by a preponderance of the evidence, that the claimant is not entitled to an award. This Court has previously deferred to similar determinations by agencies charged with administering federal statutes. See *NLRB* v. *Transportation Management*, 462 U.S. at 401-403; *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-796 (1990); cf. *Steadman* v. *SEC*, 450 U.S. 91, 103-104 (1981) (discussing agency practice regarding standard of proof required to support decision). The same deference is appropriate in this case, unless the Secretary's allocation of the ultimate burden of persuasion to employers under the complex compensatory schemes at issue here is, as a matter of "policy and fairness based on experience" (*Keyes*, 413 U.S. at 209), unreasonable or inconsistent with some statutory command. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). It is neither, and it should therefore be upheld.

B. Application Of The "True Doubt" Rule Is A Longstanding And Reasonable Implementation Of The LHWCA And Furthers The Policies Underlying That Act

Since its enactment in 1927, the LHWCA has provided that claims adjudicators "shall not be bound

by common law or statutory rules of evidence or by technical or formal rules of procedure." 33 U.S.C. 923(a). That statutory command provides the Secretary with considerable flexibility in establishing procedures to ensure that proceedings are conducted "in such manner as to best ascertain the rights of the parties." *Ibid.* The LHWCA does not specify which party should bear the ultimate risk of non-persuasion, and for fifty years or more administrators and federal courts reviewing claims for benefits under the Act have applied some variation of the principle that "doubtful questions incapable of scientific resolution are to be resolved in favor of the workman." *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d at 887 n.1, 888 (quoting 1943 administrative decision); see *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932).[12] That principle, refined over time and now embodied in what has come to be known as the "true doubt" rule, has proven sound in practice and indeed has become an integral part of the administrative scheme.

In 1972, Congress amended the LHWCA to provide for the first time that hearings on benefits claims should be conducted by special hearing examiners (now administrative law judges) and in accordance with

---

[12] See also, *e.g.*, *Southern S.S. Co.* v. *Norton*, 101 F.2d 825, 827 (3d Cir. 1939); *Southern Pac. Co.* v. *Sheppeard*, 112 F.2d 147, 148 (5th Cir. 1940); *Friend* v. *Britton*, 220 F.2d 820, 821 (D.C. Cir.) cert. denied, 350 U.S. 836 (1955); *Young & Co.* v. *Shea*, 397 F.2d 185, 188, on petition for rehearing, 404 F.2d 1059, 1061 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481 (5th Cir. 1986) (per curiam); *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990) (per curiam); *Jones* v. *Director, OWCP*, 977 F.2d 1106, 1109 (7th Cir. 1992).

the adjudication provisions of the APA. Pub. L. No. 92-576, § 14, 86 Stat. 1261 (1972), amending 33 U.S.C. 919(d). The same amendments substantially revised the process for review of claims determinations, transferring the initial review function previously performed by the federal district courts to the newly created Benefits Review Board. Pub. L. No. 92-576, § 15, 86 Stat. 1261, amending 33 U.S.C. 921(b). But although Congress amended 33 U.S.C. 923(a) to insert a reference to the Board (in addition to deputy commissioners) (see Pub. L. No. 92-576, § 15(e), 86 Stat. 1262), it did not alter the language in that Section providing that the conduct of investigations, inquiries and hearings "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure."

The legislative history of the 1972 amendments expresses some dissatisfaction with the previous lack of separation between administrative and adjudicative functions, and a desire to conform the LHWCA scheme to a model of administrative and judicial review that had proven successful in other workers' compensation contexts. *E.g.*, S. Rep. No. 1125, 92d Cong., 2d Sess. 13-15 (1972). There is no indication, however, of any similar dissatisfaction with basic principles, such as the "true doubt" rule, that had by that time become established in administrative and judicial practice under the Act. The congressional consideration of LHWCA adjudication issues evidenced by the 1972 amendments, the lack of any change in those amendments to established principles of adjudication under the Act, and the subsequent reaffirmation of the "true doubt" rule by the new independent hearing officers and Benefits Review Board, all reinforce the conclusion that the "true doubt" rule was (and remains) a permissible policy for the Secretary to adopt

in implementing the Act. Cf., *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974).

Assigning the risk of non-persuasion to the employer in claims adjudication is also reasonable as a matter of policy. The "true doubt" rule comports with the more general principle that the LHWCA is a remedial statute that should be construed liberally in favor of the employee or his dependents. See, *e.g.*, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). The longstanding assignment of "the burden of possible error on those best able to bear it," *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 888 (2d Cir. 1944), flows naturally from the statute's purposes. Because the LHWCA was intended to provide injured workers and their survivors with "a certain and immediate recovery," *Abbott* v. *Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 632 (5th Cir. 1989), cert. denied, 494 U.S. 1082 (1990), the Secretary may permissibly conclude that, where the evidence is equally balanced, injured workers should not have to bear the ultimate risk of non-persuasion concerning "doubtful questions incapable of scientific resolution," *F.H. McGraw*, 145 F.2d at 887 n.1. See also *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d at 1044. Moreover, the hazardous nature of longshore work, see S. Rep. No. 1125, 92d Cong., 2d Sess. 2 (1972), increases the probability that a reported injury will in fact be work-related. See also *Garrett* v. *Moore-McCormack Co.*, 317 U.S. at 246-248 (noting special rules historically fashioned to protect maritime workers, and fashioning burden-of-persuasion rule in accordance with that tradition).

Imposition of the risk of error on employers in cases where the evidence is equally balanced is hardly inequitable. In return for their participation in the overall benefits scheme, the LHWCA accords employers "definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 281-282 (1980); see also *Grizzle* v. *Pickands Mather & Co.*, 994 F.2d 1093, 1101 (4th Cir. 1993) (Hall, J., dissenting) ("liberality toward claimants is the quid pro quo for employers' immunity from potentially ruinous common-law tort suits").[13]

The longstanding administrative practice of imposing the ultimate risk of non-persuasion on the employer rather than the employee thus does not conflict with the LHWCA. To the contrary, it is firmly rooted in the legal premises and remedial goals of the Act.

C. Application Of The "True Doubt" Rule Is An Appropriate Implementation Of The BLBA, And Rests In Part On A Reasonable Interpretation Of The Secretary's Own Regulations Under That Act

Many of the same considerations that support application of the "true doubt" rule under the LHWCA also support its application under the BLBA. In addition, under the BLBA, the "true doubt" rule rests on the Secretary's interpretation not only of the underlying Act itself, but also of his own implementing regulations.

---

[13] The LHWCA also provides employers with ample means to develop evidence relevant to contesting the claimant's eligibility for benefits. See, *e.g.*, 33 U.S.C. 907(d)(4); 20 C.F.R. 702.410(c) (employee must submit to employer's medical examination); 33 U.S.C. 907(c)(2) (employee who chooses his own physician must obtain employer's consent to change physicians).

When Congress in 1969 enacted the legislation that became the BLBA, it incorporated many provisions of the LHWCA, including its procedures for the processing and adjudication of claims. See 30 U.S.C. 932(a) (reprinted at App., *infra*, 3a-4a), incorporating, *inter alia*, 33 U.S.C. 919-921 (as well as 33 U.S.C. 923(a), discussed above). It is therefore not surprising that from the time that administration of the BLBA was assigned to the Department of Labor, petitioner, the Benefits Review Board and the courts have all applied the "true doubt" rule developed under the LHWCA to BLBA cases as well.[14] As in the case of the LHWCA, the BLBA contains broad grants of regulatory and procedural authority, and no provision restricting allocation of the burden of persuasion in claims proceedings. See 30 U.S.C. 902(f), 936(a) and 957 (regulatory authority); 30 U.S.C. 932(a) (incorporating procedural provisions, including 33 U.S.C. 923(a), from the LHWCA). There is therefore no statutory basis for rejecting the Secre-

---

[14] See, *e.g.*, Pet. App. 19a n.3; 43 Fed. Reg. 36,826 (1978); Coal Mine (BLBA) Procedure Manual ch. 2-100, ¶ 3(b)(2) (Feb. 1980); *Lesicko* v. *Peabody Coal Co.*, 1 Black Lung Rep. (MB) 1-87, 1-91 (Ben. Rev. Bd.), aff'd on reconsideration, 1 Black Lung Rep. (MB) 1-276, 1-282 (Ben. Rev. Bd. 1977), rev'd on other grounds, 581 F.2d 121 (7th Cir. 1978); *Provance* v. *U.S. Steel Corp.*, 1 Black Lung Rep. (MB) at 1-486; *Skukan* v. *Consolidation Coal Co.*, 993 F.2d 1228, 1238 (6th Cir. 1993), petition for cert. pending, No. 93-964; *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 710 (7th Cir. 1993) (per curiam) (citing cases), petition for cert. pending, No. 93-935; *Greer* v. *Director, OWCP*, 940 F.2d 88, 90 & n.3 (4th Cir. 1991). Prior to the decision in *Greenwich Collieries*, the Third Circuit itself had approved use of the rule in BLBA cases. See *Kowalchick* v. *Director, OWCP*, 893 F.2d 615, 621 (1990); *Bonessa* v. *United States Steel Corp.*, 884 F.2d 726, 730 (1989).

tary's use of the "true doubt" rule. Compare *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (approving deference to Secretary in connection with BLBA's "complex and highly technical regulatory program").

Moreover, and again as in the case of the LHWCA, application of the "true doubt" rule is consistent with congressional intent. The Senate Report accompanying the 1972 amendments to the BLBA states that the Act "is intended to be a remedial law * * *. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S. Rep. No. 743, 92d Cong., 2d Sess. 11 (1972). When Congress amended the BLBA again in 1978, the Senate Report "underscore[d] and reaffirm[ed]" the earlier intention that doubts should be resolved in favor of the claimant, and stated that the Secretary of Labor (who first received authority to define "total disability" and establish appropriate "criteria" in 1978, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 110 (1988)) was expected to promulgate standards that give the benefit of any doubt to the miner.[15] S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977); see also *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d at 709-710 & n.5.

---

[15] Between the 1972 and 1978 amendments, the Department explicitly brought to Congress's attention, in discussing the "burden of proof" under the black lung statute, that "conflicts in the evidence are required to be resolved by the adjudicator in favor of the claimant." See N. Snyder & M. Solomons, *Black Lung—A Study in Occupational Disease Compensation* 30-31 (1976), *reprinted in Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 459, 488-489 (1976).

The Secretary's current implementing regulations, promulgated under authority of the 1978 amendments (see 20 C.F.R. 718.1(a)), reflect those expressions of congressional intent, while at the same time ensuring that claimants produce sufficient evidence to support their entitlement before benefits may be awarded. Thus, 20 C.F.R. 718.3(c) provides:

> Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

While Section 718.3(c) is not the original source of the "true doubt" rule, it embodies the same balance between requiring claimants to adduce sufficient evidence of eligibility, and giving claimants the benefit of the doubt in the limited class of cases in which conscientious evaluation leaves the adjudicator unable to conclude that either side has supplied more persuasive evidence than the other on a particular point.[16] As least in adjudications covered by the reg-

---

[16] The final sentence of Section 718.3(c) also refutes the notion that application of the "true doubt" rule seeks to "recreate" the statutory presumptions that Congress repealed in 1981. See *Freeman United Coal Mining Co.* v. *OWCP*, 999 F.2d 291, 293 (7th Cir. 1993) (statement of Easterbrook, J., respecting suggestion of rehearing en banc). That sentence requires a claimant to produce sufficient evidence to support an award of benefits—in general, to support findings that he has pneumoconiosis, that he is totally disabled, and that the

ulations in Part 718, application of the "true doubt" rule is grounded not only in a permissible construction of the underlying statute and practical implementation of its remedial policies, but in the Secretary's interpretation of his own regulations. That interpretation is neither plainly erroneous nor inconsistent with the regulation's language, and it is therefore entitled to "controlling weight." *E.g.*, *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993); see also *Mullins Coal*, 484 U.S. at 159-160.

Another section of the Secretary's regulations implementing the BLBA, 20 C.F.R. 718.403, provides that "[e]xcept as provided in this subchapter [20 C.F.R. Pts. 718-727], the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation." The court of appeals mistakenly concluded in *Greenwich Collieries* (Pet. App. 8a-11a) that Section 718.403 imposes the burden of persuasion on a BLBA claimant, and therefore precludes application of the "true doubt" rule. The Secretary, however, construes Section 718.403 to allocate only the burden of production, not the burden of persuasion.[17] As dis-

---

disability is due to the disease. See 20 C.F.R. 718.201-718.206. The "true doubt" rule comes into play only after the claimant has met that burden and the employer has introduced equally (but not more) probative evidence contesting eligibility. The repealed presumptions did not require claimants to produce such evidence on each element necessary for entitlement. See 30 U.S.C. 921(c)(2) and (4), (5).

[17] In this respect, we likewise disagree with the Sixth Circuit's statement in *Skukan*, 993 F.2d at 1238, that Section 718.403 "assigns the burden of persuasion to the claimant." If Section 718.403 were construed to allocate the burden of persuasion, it would conflict with Section 718.3(c), which requires that the regulations be "construed and applied" to

cussed below (see pages 34-40, *infra*), this Court has correctly construed the phrase "burden of proof" in Section 7(c) of the APA in the same manner. *Transportation Management*, 462 U.S. at 404 n.7 In any event, the phrase "burden of proof" or "burden of proving" is not self-defining; it may refer to the burden of either production or persuasion. See also, *e.g.*, *Ward's Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 660 (1989); *Black's Law Dictionary* 196 (6th ed. 1990); 9 J. Wigmore, *supra*, §§ 2485-2488; *Hazardous Waste Treatment Council* v. *EPA*, 886 F.2d 355, 366-367 (D.C. Cir. 1989) (per curiam) (construing regulation imposing "burden of proving" certain facts to allocate burden of production), cert. denied, 498 U.S. 849 (1990). Because, again, the Secretary's construction of his regulation is neither plainly erroneous nor inconsistent with the text of the regulation itself, it must control.[18] *Stin-*

---

give claimants "the benefit of all reasonable doubt" as to the eixstence of death or disability due to pneumoconiosis. See *Skukan*, 993 F.2d at 1238. Any such conflict would be resolved in favor of Section 718.3(c) (and application of the "true doubt" rule) by the introductory clause of Section 718.403: "Except as provided in this subchapter, * * *." Section 718.3(c), as construed by the Secretary, makes special provision for situations of "true doubt."

[18] The court of appeals based its decision in *Greenwich Collieries* in part on the premise that application of the "true doubt" rule is inconsistent with this Court's decision in *Mullins Coal*. Pet. App. 5a-6a. *Mullins* upheld the Secretary's view that the "interim presumption" regulation applicable to older BLBA claims (see note 4, *supra*), which provides that a claimant may invoke a presumption of eligibility by "establish[ing]" one of several predicate facts (20 C.F.R. 727.203(a)), requires an evaluation of all relevant evidence adduced by both parties in determining whether a particular invocation fact has been established. 484 U.S. at 146-152. It did

son, 113 S. Ct. at 1919; *Mullins Coal*, 484 U.S. at 159-160.

Policy considerations similar to those under the LHWCA also support application of the "true doubt" rule in black lung cases. Like the LHWCA, the BLBA is a remedial workers' compensation statute that Congress intended to be liberally construed. The BLBA is based on Congress's recognition that in addition to more obvious dangers, coal mining can lead gradually and insidiously to respiratory disabilities the precise causes and effects of which may be difficult to establish with medical or legal certainty. See *Mullins Coal*, 484 U.S. at 158; *Collins* v. *Old Ben Coal Co.*, 861 F.2d 481, 489 (7th Cir. 1988). Claimants are often sick or elderly individuals who have limited resources. See Employment Standards Admin., U.S. Dep't of Labor, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14-18 (1983). To be sure, the compensation scheme must and does afford

---

not, as the court of appeals believed (Pet. App. 6a), mandate that a claimant proceeding under a different set of regulations establish his entitlement to benefits without use of the "true doubt" rule. The Court did state, in the last footnote to the opinion, that the regulation at issue in that case "requires a claimant to prove an invocation fact by a preponderance of the evidence." 484 U.S. at 161 n.35. In discussing the *employer's* burden under the same regulation, however, the Court explicitly noted the use of the "true doubt" rule, which "ensures that the employer will win, on invocation or rebuttal, only when its evidence is *stronger* than the claimant's." 484 U.S. at 144 n.12; see also *id.* at 156 n.29. Quite aside from the fact that *Mullins* deferred to the Secretary's interpretation of a regulation that is not at issue in these cases, it would be extremely odd to read that decision to prohibit use of an evidentiary rule the existence and effect of which were explicitly recognized in the Court's opinion.

mine employers a full opportunity to ascertain and demonstrate that a particular claim lacks merit.[19] See, *e.g.*, 20 C.F.R. 718.402, 725.409(a)(1) (claimant must provide medical records and submit to examination by employer's physician); 725.414(a) (development of employer's evidence); see also *Woodward* v. *Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) (discussing effect of cumulative evidence typically produced by employers' medical experts). In implementing the BLBA, however, the Secretary is surely within the bounds of his discretion in determining that after all the evidence has been developed by the parties and conscientiously weighed, the residual risk of uncertainty should be placed on mine operators rather than on individual claimants.[20]

---

[19] The opportunity provided appears to be adequate. In recent years the approval rate for BLBA claimants, with full application of the "true doubt" rule, has been approximately 7%. Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1991*, at 21 (1992).

[20] As the BRB has held, an ALJ should find the evidence in equipoise, and therefore apply the "true doubt" rule, only after carefully considering all of the evidence adduced by both parties and exhausting all methods of evaluating it. See *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981) (ALJ "must indicate with some specificity what evidence he believes or disbelieves and why" before applying the "true doubt" rule); cf. *Medina* v. *California*, 112 S. Ct. at 2579 (allocation of burden of persuasion affects only "a narrow class of cases where the evidence is in equipoise"). In *Greenwich Collieries* petitioner believes, as the government argued in the court of appeals, that the ALJ adequately evaluated the conflicting x-ray evidence of the existence of pneumoconiosis and permissibly applied the "true doubt" rule to resolve that issue. Gov't C.A. Br. 39-42. The ALJ's opinion does not, however, reflect an adequate evaluation or weighing of the evidence concerning whether the claimant was totally

II. THE "TRUE DOUBT" RULE DOES NOT CONTRAVENE SECTION 7(c) OF THE ADMINISTRATIVE PROCEDURE ACT

The court of appeals held in *Maher Terminals* that Section 7(c) of the APA, 5 U.S.C. 556(d), independently imposes the burden of persuasion on a benefits claimant. J.A. 17-18, 24. It further held that so long as the burden of persuasion rests on the claimant, application of the "true doubt" rule violates the APA's additional requirement that the party bearing that burden prove his case by a preponderance of the evidence. We agree that the "true doubt" rule, in the narrow circumstances in which it applies, allocates the risk of non-persuasion to the employer. That allocation, however, does not contravene the APA, both because Section 7(c) allocates only the burden of production (not the burden of persuasion), and because claims adjudications under the BLBA and LHWCA are not in any event governed by Section 7(c).

A. Section 7(c) Imposes Only A Burden Of Production, Which A Claimant Must Meet Before The "True Doubt" Rule May Be Applied

As the court of appeals recognized (J.A. 16-19), Section 7(c) of the APA addresses two separate questions: the burden imposed upon the proponent of a particular agency order, and the standard of proof that must be met by whichever party bears the burden of persuasion. The first of those questions

---

disabled. The ALJ therefore did not properly justify her resort to the "true doubt" tie-breaker on that issue, and the case should be remanded with instructions to the ALJ either to weigh and resolve the conflict in the evidence, or to explain a finding that after careful evaluation the evidence remains in equipoise. See *id.* at 42-45.

is addressed by the first sentence of Section 7(c), which provides: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." This Court has previously concluded that this sentence requires only that the party advocating a particular result bear the burden of *production* with respect to that issue. *Transportation Management*, 462 U.S. at 404 n.7.

The second question identified by the court of appeals is addressed by the third sentence of Section 7(c), which provides: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." This Court has held that the third sentence of Section 7(c) requires only that the party who bears the burden of persuasion on an issue must establish its position by a preponderance of the evidence, in the absence of a separate statutory (or, presumably, regulatory) provision imposing a higher standard. *Steadman*, 450 U.S. at 98-102.

Transportation Management and *Steadman*, read both separately and together, permit use of the "true doubt" rule. Under *Transportation Management*, Section 7(c) requires only that the claimant come forward with sufficient evidence to support a ruling in favor of an award of benefits.[21] See generally

---

[21] Section 7(c)'s allocation of the burden of production applies only "[e]xcept as otherwise provided by statute." Section 20(a) of the LHWCA, 33 U.S.C. 920(a), provides a presumption, "in the absence of substantial evidence to the contrary," that a claim comes within the provisions of the Act. That presumption places a burden of production on the employer, but ceases to have any effect once the employer meets that burden. See generally *U.S. Indus./Federal Sheet Metal,*

McCormick, *supra*, § 338; 9 J. Wigmore, *supra*, § 2487. After the claimant has met that burden of production and the employer has introduced contrary evidence, the factfinder may find, after conscientious evaluation, that the evidence on both sides is in equipoise. In such cases, *Transportation Management* permits an agency to assign the risk of non-persuasion to the party opposing an award of benefits.

Steadman does not divest an agency of the authority that *Transportation Management* recognizes, because *Steadman* does not address the allocation of the burden of persuasion. *Steadman* holds only that in the absence of other authority, the third sentence of Section 7(c) prescribes that whoever bears the burden of persuasion may carry that burden by a preponderance of the evidence—a standard that "results in a roughly equal allocation of the risk of error between litigants." *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). That is the standard applied under the "true doubt" rule. Indeed, the court of appeals itself acknowledged that "*Steadman*, standing alone, does not allocate the burden of persuasion, but rather defines its scope as a preponderance of the evidence." J.A. 17.

The court of appeals also acknowledged more broadly that *Transportation Management*, *Steadman*, Section 7(c) and the "true doubt" rule may be harmonized in the manner we propose. J.A. 15-17, 19. The Court rejected that conclusion, however, on the

---

Inc. v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982); *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935). At that point, in order to prevail, the claimant must still adduce evidence that is both sufficient to justify a finding in his favor and—under the "true doubt" rule—at least equal in overall weight to the evidence adduced by the employer.

ground that if Section 7(c) requires particular agency action to be supported by a preponderance of the evidence, "the inevitable conclusion is that the proponent of that [action] must bear the burden of persuasion." J.A. 19. That conclusion, however, is by no means "inevitable." Indeed, it is contrary to the available evidence of congressional intent and to established precedent, internally inconsistent, and unsound as a matter of policy.

1. The language of Section 7(c) does not compel the court of appeals' construction. As the court itself acknowledged (Pet. App. 8a-9a), the term "burden of proof" used in the first sentence of that section may refer to a burden of either persuasion or production, and this Court held in *Transportation Management* that it prescribes only a burden of production. As just discussed, there is no inconsistency between reading the first sentence to impose only a burden of production and giving full effect to the third sentence, which speaks to the nature of the evidence that must be produced to sustain agency action. In a "true doubt" case, both parties will have produced evidence that, standing alone, would meet the requirements imposed by the third sentence. Because each party's evidence stands not alone, however, but in balance with the other's, the question remaining to be resolved is which of the equivalent but opposite showings is to prevail. As to that question, the text of Section 7(c) is silent. The statute therefore allows the Secretary to allocate the risk of non-persuasion in this setting to the party (the employer) who is the proponent of an order denying benefits.

The court of appeals held, however, that the third sentence of Section 7(c) allocates the burden of persuasion to the claimants in these cases. J.A. 15-16,

17-20. That conclusion is difficult to reconcile with the text and structure of Section 7(c): if any portion of that Section were to be read to allocate the burden of persuasion, it would be the *first* sentence, which uses the phrase "burden of proof." It would be strange to find an implicit allocation of the burden of persuasion in the third sentence, which does not refer to the "burden of proof" at all.

This understanding of the text of Section 7(c) is confirmed by the legislative history. The House and Senate Reports make clear that the term "burden of proof" in Section 7(c) was indeed used to mean "burden of production." See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946); S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945) (burden of proof means "that the party initiating the proceeding has the general burden of coming forward with a prima facie case").[22] The Reports also indicate that the term "proponent" is not limited to a party who initiates an agency proceeding, "but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." *Ibid.* If both (or multiple) parties are "proponents" with their own burdens of "proof" on the central issue of whether the agency should take action, the term must mean "burden of production." Two or more parties can each have a burden of production on the same issue, but only one party can have the ultimate burden of

---

[22] The *Attorney General's Manual on the Administrative Procedure Act* 75 (1947), to which this Court has given some deference (see, *e.g.*, *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2545 n.10 (1993)), also recognizes that "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward.'"

persuasion. Thus, the legislative history confirms that the first sentence of Section 7(c) does not allocate the burden of persuasion.

The APA's history similarly provides scant support for the court of appeals' holding that the third sentence of Section 7(c) nevertheless imposes the burden of persuasion on the proponent of agency action. As the court itself recognized, that history, read together with *Steadman*, provides at least equal support for the proposition that "the party who seeks a denial of relief is *also* required" to prove its case by a preponderance of the evidence. J.A. 19; see H.R. Rep. No. 1980, *supra*, at 36; S. Rep. No. 752, *supra*, at 22 ("the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence"). There is no statutory or other warrant for concluding that the APA was intended to resolve those competing requirements through application of an absolute—yet unstated—rule that always places the risk of non-persuasion on the party seeking to change whatever happens to be the *status quo* when a request for agency action is made. It is both more sensible and more consonant with the traditional flexibility of the administrative process to construe Section 7(c) to allow the agency responsible for implementing a statute to determine, in light of all relevant considerations, which party should bear that risk in the particular statutory context.

Our analysis of Section 7(c), unlike that of the court below, is well established. The leading court of appeals case analyzed the issue thoroughly more than 17 years ago and concluded that the APA imposes only a burden of production, not a burden of persuasion. *Environmental Defense Fund, Inc.* v. *EPA*,

548 F.2d at 1004, 1013-1015. Other courts of appeals and commentators—not mentioned by the Third Circuit in the decisions below—have consistently reached the same conclusion.[23] This Court was therefore correct in adopting that reading of Section 7(c) in *Transportation Management*, 462 U.S. at 404 n.7 (citing *Environmental Defense Fund, supra*).[24] There is no reason to abandon that holding in this case.

2. The court of appeals' decision is also internally inconsistent. Apparently recognizing that imposition of the burden of persuasion on the proponent of

[23] See, *e.g.*, *Skukan*, 993 F.2d at 1235-1239; *Freeman United*, 988 F.2d at 711; *Dazzio* v. *FDIC*, 970 F.2d 71, 77 (5th Cir. 1992); *Merritt* v. *United States*, 960 F.2d 15, 18 (2d Cir. 1992); *Hazardous Waste Treatment Council*, 886 F.2d at 366-368; *Alameda County Training & Employment Bd.* v. *Donovan*, 743 F.2d 1267, 1269 (9th Cir. 1984); *Maine* v. *United States Dep't of Labor*, 669 F.2d 827, 829 (1st Cir. 1982); *Old Ben Coal Corp.*, 523 F.2d at 39-40; 4 J. Stein *et al.*, *Administrative Law* § 24.02, at 24-21 n.3 (1993); 3 K. Davis, *Administrative Law Treatise* § 16.9, at 257-258 (2d ed. 1978).

[24] The court of appeals sought to avoid the force of *Transportation Management* on the ground that this Court had construed only the first sentence of Section 7(c). See J.A. 16. The beginning of this Court's discussion did paraphrase the first sentence of Section 7(c), noting that "the proponent of an order has the burden of proof." 462 U.S. at 404 n.7. But the Court's rejection of Transportation Management's argument based on Section 7(c) did not suggest that it was responding only to an argument based on one sentence, or that it was reserving judgment on the effect of some other portion of the same Section. The Court stated: "Section 7(c), however, determines only the burden of going forward, not the burden of persuasion." *Ibid.* The Court's initial paraphrasing of the first sentence simply reflects the fact that it is only that sentence, with its reference to the "burden of proof," that could plausibly be read to allocate the burden of persuasion.

agency action as to every issue in every proceeding would be neither reasonable nor consistent with this Court's precedents, the court acknowledged (J.A. 21) what it termed a "logical exception" for "affirmative defenses" like that at issue in *Transportation Management*. The court identified, however, no textual basis for the "logic" of that exception, and none suggests itself (other than the need to reconcile the holding below with that of *Transportation Management*). Compare 4 J. Stein *et al.*, *Administrative Law* § 24.02, at 24-28 to 24-31 (1993) (discussing different treatments of "affirmative defenses" in administrative proceedings).[25] In any event, if ex-

[25] The result of a party's successful interposition of an affirmative defense is the denial of the order that the proponent seeks—the same result that follows if the party successfully opposes the proponent's claim in some other manner, such as by rebutting his affirmative case. If, as the court of appeals held, the text of Section 7(c) always requires the proponent of an order to bear the burden of persuasion, that requirement would seem to apply equally to issues raised by other parties in affirmative defenses. That result, of course, would make no sense in the vast majority of cases involving affirmative defenses, as the court of appeals acknowledged. The proper conclusion to be drawn from that insight, however, is not that there is an implied exception (for affirmative defenses) to an otherwise absolute rule that the burden of persuasion rests on the party who initiates an agency proceeding, with respect to all issues in the proceeding. Rather, the proper conclusion is that Section 7(c) allows the agency to allocate the burden of persuasion (after the proponent carries his initial burden of production), taking account of various statutory and evidentiary policies—including, for example, that the agency has concluded that a particular issue raised by another party should be regarded as in the nature of an affirmative defense. See *Transportation Management*, 462 U.S. at 400, 402. Moreover, the National Labor Relations Act, at issue in *Transportation Management*, expressly pro-

ceptions are to be made to a burden of persuasion otherwise imposed (in the court of appeals' view) by Section 7(c), it would be at least as "logical" to craft one for the principle on which the Secretary relies in these cases: that in particular statutory contexts an agency is entitled to conclude, on the basis of its factual and policy expertise, that where both the proponent and the opponent of agency action have produced substantial and essentially equivalent probative evidence, the doubt should be resolved in favor of action (or, in this case, the provision of benefits).

3. Finally, the court of appeals' decision, which *requires* agencies to allocate the risk of nonpersuasion in the same manner regardless of the context or circumstances, itself contravenes the policy of the APA, which was not intended to impose undue restrictions on government operations. See 5 U.S.C. 556(d); S. Rep. No. 752, *supra*, at 5, 22; H.R. Rep. No. 1980, *supra*, at 16, 36. As discussed above (see pages 19-20, *supra*), allocation of the burden of persuasion in civil litigation is a matter generally left to the courts, to be resolved as a matter of "policy and fairness based on experience in * * * different situations." *Keyes*, 413 U.S. at 209. Agencies have typically operated under similar principles (see pages 20-22, *supra*), and Section 7(c) should not

---

vides that a violation may be found only "upon a preponderance of the testimony" before the Board. 29 U.S.C. 160(c). The Court held that the allocation of the burden of persuasion to the employer on the "affirmative defense" was permissible despite that general statutory allocation. See 462 U.S. at 401-403. In this case, by contrast, neither the BLBA nor the LHWCA contains such a provision that allocates the burden of persuasion to the claimant, and Section 7(c) does not impose such a requirement government-wide where the particular statute at issue does not do so.

now be construed to render the rules governing administrative proceedings more rigid than those applicable in judicial proceedings. Compare 33 U.S.C. 923(a) ("common law or statutory rules of evidence" and "technical or formal rules of procedure" do not govern LHWCA hearings); 30 U.S.C. 932(a) (incorporating same provision into BLBA).

B. Adjudications Under The BLBA And The LHWCA Are Not, In Any Event, Governed By Section 7(c)'s "Burden Of Proof" Provision

Section 7(c) of the APA imposes the "burden of proof" on the proponent of agency action "[e]xcept as otherwise provided by statute." 5 U.S.C. 556(d). That exception removes the BLBA and the LHWCA from the purview of Section 7(c), regardless of whether that Section imposes a burden of production or the burden of persuasion.

1. The Federal Mine Safety and Health Act, of which the BLBA is a part, states that "[e]xcept as otherwise provided in this chapter [30 U.S.C. 801-962], the provisions of sections 551 to 559 and sections 701 to 706 of title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof." 30 U.S.C. 956. Thus, as a general matter, the Act expressly renders 5 U.S.C. 556(d) and other APA provisions inapplicable to proceedings under the BLBA.

Section 422(a) of the BLBA, 30 U.S.C. 932(a), does incorporate certain provisions of the LHWCA, including 33 U.S.C. 919(d). Section 919(d) provides that hearings under the LHWCA are to be conducted in accordance with 5 U.S.C. 554, and Section 554(c)(2) in turn provides that hearings will be governed by Sections 556 and 557. The incorpora-

tion of LHWCA and APA provisions in Section 422(a) of the BLBA is itself subject to an exception, however, where "otherwise provided * * * by regulations of the Secretary."[26] 30 U.S.C. 932(a). Although 20 C.F.R. 725.452(a) provides generally that hearings shall be conducted in accordance with 5 U.S.C. 554 *et seq.*, it too applies only "[e]xcept as otherwise provided by this part." Another section in Part 725—20 C.F.R. 725.4(a)—provides that "Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is or was totally disabled * * * [or] died due to pneumoconiosis, shall be applicable to the determination of claims under this part." As discussed above (see pages 29-30, *supra*), Section 718.3(c) of the regulations states that a BLBA claimant shall be "given the benefit of all reasonable doubt," and embodies the principle of the "true doubt" rule. That rule is therefore "otherwise provided * * * by regulations of the Secretary" within the meaning of 30 U.S.C. 932(a), and supersedes anything to the contrary in Section 7(c) of the APA.

This regulatory recognition of the "true doubt" rule is consistent with Congress's intent to incorpo-

[26] The Secretary's authority under this exception has been recognized in various appellate cases. See, *e.g.*, *West* v. *Director, OWCP*, 896 F.2d 308, 310 (8th Cir. 1990); *Patton* v. *Director, OWCP*, 763 F.2d 553, 559-560 (3d Cir. 1985); *Director, OWCP* v. *Bivens*, 757 F.2d 781, 785-786, 787-788 (6th Cir. 1985). Dicta in some other cases suggest that there may be limits on the Secretary's authority to supersede the APA's requirements by regulation, but none of those cases involved Section 7(c). See *U.S. Pipe & Foundry Co.* v. *Webb*, 595 F.2d 264, 273-274 (5th Cir. 1979); *Director, OWCP* v. *Alabama By-Prods. Corp.*, 560 F.2d 710, 718 (5th Cir. 1977); *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310, 341 (7th Cir. 1977).

rate the specified LHWCA provisions into the BLBA "to the extent the Secretary determines them applicable" and to allow the Secretary "adequate flexibility" in administering the black lung program. 115 Cong. Rec. 39,996 (1969) (summary of conference report). For the reasons discussed above, Congress also intended the Secretary to promulgate standards that give miners the benefit of the doubt. The text and purposes of the BLBA thus both support the conclusion that the Secretary would be within his discretion in applying the "true doubt" rule, even if it were otherwise thought to be inconsistent with a more general burden of persuasion requirement under the APA.

2. The LHWCA's provisions also satisfy the "except as otherwise provided" language of Section 7(c). That language does not require that the superseding statutory provision refer expressly to Section 7(c) itself, to the APA, or even to "burdens of proof."[27] As discussed above (see pages 22-24, *supra*), 33 U.S.C. 923(a) provides as a general rule that in conducting an investigation or hearing under the LHWCA, "the deputy commissioner or Board shall not be bound by common law or statutory rules

[27] See, *e.g.*, *Panhandle Producers & Royalty Owners Ass'n* v. *Economic Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987) (implicit intent from language of statute); *Stearns Elec. Paste Co.* v. *EPA*, 461 F.2d 293, 305 & n.39 (7th Cir. 1972) (Stevens, J.), and *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971) (legislative history); *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965) (purposes of statute), cert. denied, 384 U.S. 972 (1966); cf. 5 U.S.C. 559 (provisions in 5 U.S.C. 551-559 will apply to a subsequently enacted statute unless the statute *expressly* supersedes or modifies them).

of evidence or by technical or formal rules of procedure." That section authorizes Departmental adjudicators to apply the "true doubt" rule.

Section 923(a)'s general rule is of course subject to exceptions "as provided by this chapter." As in the case of the BLBA (into which the relevant LHWCA provisions are incorporated), 33 U.S.C. 919(d) provides that hearings "shall be conducted in accordance with the provisions of section 554 of title 5," and 5 U.S.C. 554(c)(2) requires that hearings comply with 5 U.S.C. 556(d) (Section 7(c) of the APA). Rather than allowing the entire argument to become circular, however, Section 7(c)'s introductory clause ("Except as otherwise provided by statute") should be read to preserve the general flexibility concerning evidentiary and procedural rules prescribed by Section 23(a) of the LHWCA, 33 U.S.C. 923(a).

That reading of the APA and LHWCA is the one most consistent with congressional intent. As discussed above (see pages 22-23, *supra*), the principle that doubts are to be resolved in favor of the claimant was already established as a rule of construction under the LHWCA when the APA was enacted. There is no indication that Congress intended the APA to revise the LHWCA by reversing that settled practice. See *Attorney General's Manual*, *supra*, at 75 (considering it "clear" that Section 7(c) "was not intended to repeal specific provisions of other statutes"). Indeed, Congress did not amend 33 U.S.C. 919(d) to provide for hearings to be held in accordance with 5 U.S.C. 554 until 1972, and there is no indication that in doing so it intended to overturn the "true doubt" rule. The amendment was motivated by quite different concerns.[28] Especially in this setting, Section 7(c)'s cautionary introductory phrase, "[e]xcept as otherwise provided by statute," should be construed to preserve well-established evidentiary rules that have developed under particular statutory and administrative schemes, such as use of the "true doubt" rule under the LHWCA. See *Steadman*, 450 U.S. at 103-104 (consistent pre- and post-APA practice is persuasive evidence of Congressional intent); *Mastro Plastics*, 354 F.2d at 176 (refusing to read Section 7(c) "to disturb the traditional allocation of the burden of going forward between the parties to an adjudicative proceeding").[29]

---

[28] Until 1972, deputy commissioners investigated, held hearings, and issued final administrative decisions, 33 U.S.C. 919(c) and (d) (1964), which appeared inconsistent with the principle under the APA that an agency employee engaged in the investigation or prosecution of a case not participate in its decision. See 5 U.S.C. 554. In 1972, Congress transferred the adjudicatory functions from deputy commissioners to ALJs and required LHWCA hearings to comply with the APA. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1251, 1261 (1972). Nothing in the legislative history of those amendments indicates an intent to disturb the Department's use of the "true doubt" rule. See S. Rep. No. 1125, 92d Cong., 2d Sess. 13, 23 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11, 21 (1972); 118 Cong. Rec. 36,385 (1972).

[29] *Mastro Plastics* involved the NLRB's requirement that an employer come forward with evidence of job availability in a back pay proceeding. Courts apply a similar rule under the LHWCA, requiring that an employer at least come forward with evidence of job availability to establish that an employee is not totally disabled. See note 11, *supra*. Congress rejected a proposal to reverse those court decisions when it amended the LHWCA in 1984, and thus must not have thought them inconsistent with its incorporation of the APA's provi-

CONCLUSION

The judgments of the court of appeals should be reversed, and the cases should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor

FEBRUARY 1994

---

sions into the LHWCA more than ten years earlier. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 188-189 (1981) (statement of Samuel J. Smith, Chief Admin. Appeals Judge, BRB); 127 Cong. Rec. 9831 (1981).

APPENDIX

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

2. Pertinent provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provide as follows:

20 C.F.R. 718.3(c) provides:

> In enacting [the Black Lung Benefits] Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

20 C.F.R. 718.403 provides:

> Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

20 C.F.R. 725.452(a) provides in pertinent part:

> Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq.

3. Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(d), provides in pertinent part:

> Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5. Any such hearing shall be conducted by a[n] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

4. Section 23(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 923(a), provides in pertinent part:

> (a) In making an investigation or inquiry or conducting a hearing the deputy commissioner of Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

5. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) provides:

> Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C. 901 *et seq.*], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C. 901-904, 908-910, 912-913, 929-933, 937-938, 941, 943-948, 949-950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of title 26), be applicable to each operator of coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment

of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 801157 80113

No. 93-744

(6)

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES,

Respondent.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

MAHER TERMINALS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT PASQUALINA SANTORO IN SUPPORT OF PETITIONER

PHILIP J. ROONEY
ISRAEL, ADLER, RONCA & GUCCIARDO
Attorney for Respondent
160 Broadway
New York, New York 10038
(212) 227-1350

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

59 pp

QUESTION PRESENTED

Is the longstanding policy of the Department of Labor and courts that doubtful factual issues should be resolved in favor of the injured employee and his family with respect to claims under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefit Act, in controversion of those statutes or of the Administrative Procedure Act?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Statement of the Case 1

Summary of Argument 4

Argument 6

Point I 6

The principle that doubtful factual issues should be resolved in favor of the injured employee and his family does not contravene the Administrative Procedure Act

Point II 25

The principle that doubtful factual issues should be resolved in favor of the workman and his family comports with the underlying purpose, procedure and reading of the acts lies within the discretion of the fact-finder

Conclusion 49

TABLE OF AUTHORITIES

Page

CASES:

Avondale Shipyards, Inc. v. Kennel, 914 F.2nd 88 (5th Cir. 1990) 33

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932) 22, 29, 31

Bosner v. U.S. Department of Agriculture, 754 F.2nd 804 (9th Cir. 1984) 8

Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947) 31

Carrol v. Knickerbocker Ice Co., 218 N.Y. 435 (1916) 42

Commonwealth of Puerto Rico v. Federal Maritime Commission, 468 F.2nd 872 (D.C. Cir. 1972) 8

Crowell v. Benson, 285 U.S. 22 (1931) 14, 22, 29, 30, 36

DelVecchio v. Bowers, 296 U.S. 280 (1935) 19, 21, 32

Environmental Defense Fund v. EPA, 584 F.2nd 498 (1st Cir. 1976), *cert. denied*, 434 U.S. 925 (1977) 7, 8

F. H. McGraw & Co. v. Lowe, 145 F.2nd 886 (2nd Cir. 1944) 34

Fidelity & Casualty Co. v. Burris, 59 F.2nd 1042 (D.C. Cir. 1932) 34

Freeman v. United Coal Mining Co. v. OWCP, 988 F.2nd 706, *rehearing den.* 999 F.2nd 991 (7th Cir. 1993) 5, 21

Grizzle v. Pickands Mather & Co., 994 F.2nd 1093 (4th Cir. 1993) 22, 45

TABLE OF AUTHORITIES – Continued

Page

In Re Winship, 397 U.S. 358 (1970) 37

Interstate Commerce Commissions v. Board, 194 U.S. 25 (1904) 14

Jensen v. Union Pacific Co., 215 N.Y. 518 (1915) ..28, 29

Lavine v. Milne, 424 U.S. 577 (1976) 37

Lessar v. C. F. & I. Steel Corp., 3 BLR 163, 1-68 (1981) 35

Mid Gulf Stevedores, Inc. v. Newsome, 462 F.2nd 185 (5th Cir. 1972) 34

Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 18, 19

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1986) ..... *passim*

National Biscuit Co. v. Fogarty, 215 N.Y. 20 (1917) 31

Natural Vermont Yankee Power Corp. v. Resources Defense Council, Inc., 435 U.S. 519 (1978) 14

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) ..... *passim*

Noble Drilling Co. v. Drake, 795 F.2nd 478 (5th Cir. 1986) 34

Northeast Marine Terminal v. Caputo, 432 U.S. 249 (1977) 31

O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965) 33, 45

Opp v. Administrator, 312 U.S. 126, Mod. 312 U.S. 657 (1941) 14

TABLE OF AUTHORITIES – Continued

Page

Parsons Corp. of California v. Director, OWCP, 619 F.2nd 38 (9th Cir. 1980) 19

Paul v. Ribicoff, 206 F. Supp 606 (Co. 1962) 38

Petrie v. Oneida Steel Pully Co., 215 N.Y. 335 (1915) 31

Rogers v. Missouri Pacific Railway, 352 U.S. 500..... 37

Santosky v. Kramer, 455 U.S. 745 (1982) 37

Southern S.S. Co. v. Norton, 101 F.2nd 825 (3rd Cir. 1989) 33

Sprague v. Director, OWCP, 688 F.2nd 826 (1st Cir. 1982) 22

Steadman v. SEC, 450 U.S. 91 (1991) ... 5, 7, 16, 17, 19, 36

Strachen Shipyards v. Shea, 406 F.2nd 521 (5th Cir. 1969) 34

Union Pacific Railway v. Jensen, 244 U.S. 205 (1917) 26, 28

Voris v. Eikel, 346 U.S. 328 (1953) 31

Watson v. Golf Stevedoring Co., 400 F.2nd 649 (5th Cir. 1968) 33

Woodby v. INS, 385 U.S. 276 (1966) 19, 37

Young & Co. v. Shea, 397 F.2nd 185 (5th Cir. 1968) 35

Ziegler v. Cassidy's Sons, 220 N.Y. 98 (1917) 29

TABLE OF AUTHORITIES – Continued

Page

STATUTES, REGULATIONS AND RULE:

Administrative Procedure Act, 5 U.S.C. 551 et seq. *passim*

5 U.S.C. 551 1

5 U.S.C. 556(d) (§ 7(c)) ..... *passim*

5 U.S.C. 706(2)(e) (§ 10(e)) ..... *passim*

Naturalization and Immigration Act

8 U.S.C. 1105(a)(4) 19

8 U.S.C. 1252(b)(4) 19

Black Lung Benefits Act, 30 U.S.C. 901 et seq. 1, 4, 5, 20, 40

30 U.S.C. 932(a) 8, 20, 32

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. ..... *passim*

33 U.S.C. 904(b) 28

33 U.S.C. 905(a) 27

33 U.S.C. 906 28

33 U.S.C. 907 28

33 U.S.C. 907(a) 30

33 U.S.C. 908 28

33 U.S.C. 908(f) 23

33 U.S.C. 909 28

33 U.S.C. 914(a) 30

33 U.S.C. 918(b) 23

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. 919 ..... 14, 22

33 U.S.C. 919(a)-(c) 30

33 U.S.C. 919(d) 31

33 U.S.C. 920 19

33 U.S.C. 920(a) 30, 34

33 U.S.C. 921 ..... 14, 22

33 U.S.C. 921(b)(3) 33

33 U.S.C. 923 14

33 U.S.C. 923(a) ..... *passim*

33 U.S.C. 928(a) 48

33 U.S.C. 930(a) 30

33 U.S.C. 933(a) 27

20 C.F.R.:

Part 702

Section 702.101-.319 30

Section 702.316 8

Section 702.317 8

Section 702.331 ..... 30, 32

Section 702.338 8

Section 702.339 8

Part 718

Section 718.202 3

Section 718.203(b) 20

Section 718.403 20

TABLE OF AUTHORITIES – Continued

Page

Part 727
Section 727.203(b) 21

New York Workers' Compensation Law, Laws of the State of New York,
L1913 c.816, L1914 c.41, L1922 c.615 26

McKinney's Consolidated Law of New York (Workers' Compensation Law)
Section 10 27

Section 29 27

Section 113 ..... 29, 41

Judiciary Law (Canons of Professional Responsibility DR 5-103) 48

Federal Rules of Evidence 301 21

U.S.D.L. Rules of Evidence 29 C.F.R. 18.301 36

MISCELLANEOUS:

The Benefits Review Board Service "Longshore Reporter" 47

Fishman, *Jones on Evidence* 7th Edition, § 4.4-41 38

Jaffey, Lewis L, Admin. Law: Burden of Proof & Scope of Review, 79 Harland Law Review, 914, 915 38

Larson, "The Laws of Workmen's Compensation" 1-9, Section 2.20 29

9 Wigmore, *Evidence* (Chadbourne rev., 1981) pg. 415, Sec. 249 37

H.R. Rep. 1190, 5/13/22, pg. 2, 67th Cong., 2nd Sess. 26

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. 739, pg. 4, 1/31/22, 67th Cong., 2nd Sess. 27

H.R. Rep. 1769, 1/14/27, pgs. 19-20, 69th Cong., 2nd Sess. 27

H.R. Rep. 1980, 79th Cong., 2nd Sess. 9, 11, 39

H.R. Rep. 339, 79th Cong., 1st Sess. 10

H.R. Rep. 130, 79th Cong., 1st Sess. 14

H.R. Rep. 180, 79th Cong., 2nd Sess. 13

H.R. Rep. 92-1441, 92nd Cong., 2nd Sess. 15, 23, 27

H.R. Rep. 92-460, 92nd Cong., 2nd Sess. 32

S. Rep. 752, 79th Cong., 1st Sess. (1945) 11, 12, 13

S. Rep. 90-743, 92nd Cong., 2nd Sess. (1972) 32

S. Rep. 743, 97th Cong., 2nd Sess. (1972) 40

Congressional Record 3/12/46 (Senate) 11

Congressional Record 3/25/46 (House) 8

Congressional Record 5/24/46 (House) 12

STATEMENT OF THE CASE

This case arose out of claims under the Black Lung Benefit Act (hereinafter BLBA) 30 U.S.C. 901, et seq. and the Longshore and Harbor Workers' Compensation Act (hereinafter LHWC) 33 U.S.C. 901 et seq.

The decisions of the United States Court of Appeals for the Third Circuit attempt to invalidate a longstanding and pervasive policy, both by the courts and the Department of Labor that doubtful factual issues should be resolved in favor of the injured employee and his family, a principle explicitly engrafted onto the BLBA.

The lower court's utilization of Section 7(c) (5 U.S.C. 556(d)) of the Administrative Procedure Act, 5 U.S.C. 551 et seq. (hereinafter APA) to expound a rigid common-law preponderance of the evidence rule also raises a question as to Congress' intent in enacting that statute: whether there was intended a hammerlock on the authority of the agencies and courts of a rigid standard of evidence or whether there was intended a broad and flexible approach, leaving discretion to the agency and courts to regulate the issues such as quantum of evidence and burden of proof in accordance with the particular provisions and policies of the involved statute.

As set forth generally, in the Director's Petition, the common element in both cases was the administrative law judge's utilizing the principle that doubtful factual issues should be resolved in favor of the injured worker and his family to break an evidentiary deadlock. In the case of *Ondecko v. Greenwich Collieries* there was a conflict in the interpretation of multiple x-rays (27-30a) and of testimony (38-39a, 44a).[1] The administrative law judge felt that the opinion of Dr. Dandrea, who had been treating the claimant for some 20 years (38-39a, 44a), created

---

[1] Reference is the appendix of the director's Petition for Writ of Certiorari. References marked "JA" as references to the joint appendix.

true doubt as against the employer's evidence and concluded that the claimant had proved pneumoconiosis in resulting permanent total disability (41a), a determination upheld by the Benefits Review Board (20a). In the matter of *Santoro v. Maher Terminals* there was a likewise sharp dispute in medical testimony. While it was accepted that the employee had an injury to the neck (JA26) there was an issue as to whether the injury caused his death due to complications from paralysis in the presence of a rare and slow growing malignancy that had apparently existed for many years (JA39, JA40, JA50). There was uncontradicted testimony of a worsening of the claimant's condition after the initial injury (JA37-39, JA45). The employer's medical witness, Dr. Derby, who had never examined the employee during his lifetime disputed that he injured his neck (JA42, JA49), disputed the testimony of the claimant's attending physician as to the appearance of the tumor, although this witness had never seen it (JA46) and stated that the malignancy had by coincidence escalated to cause paralysis and death (JA48, JA49, JA50).

After a meticulous review of all of the evidence it was determined that the record, contrary to the assertion of the employer's consultant, Dr. Derby, showed an unbroken history of neck pain (JA45, JA53) concluded that there was conflicting probative evidence and that the doubt should be resolved in favor of the claimant (JA50). The petition for reconsideration was denied (JA34-35) and the Benefits Review Board affirmed the decision (JA25-33).

Both cases appeared for oral argument before the United States Court of Appeals for the Third Circuit in January 12, 1993 and in both cases the Court reversed the decisions of the Board and remanded the cases back to the respective administrative law judges to consider if the claimants had proved their cases by a preponderance of the evidence, with a direction that if the evidence was

again found to be in equipoise the respective employers must prevail (16a, JA24).[2]

In neither case did the Third Circuit inquire into the existence of substantial evidence to support the conclusion. In the *Greenwich Collieries* case, the court concluded that the widow had to prove her case by a preponderance of the evidence and came to this conclusion in reliance on the department's own regulation at 20 CFR 718.202 and certain language in this court's holding in *Mullin's Coal Co. v. Director, OWCP*, 484 U.S. 135 (1986). Although the Administrative Procedure Act was generally discussed the court specifically deferred determining if Section 7(c) was controlling (11a, Note 4).

In *Maher Terminals v. Director*, OWCP, (JA8-24), lacking the rationalization of Department of Labor regulations and the *Mullins* case, the Third Circuit voided the principle of resolving true doubt in favor of the claimant by a strained interpretation of 7(c) of the APA (5 U.S.C. 556(d)). The court concluded that the widow was required to prove her case by a preponderance of the evidence and the long line of circuit court cases affirming the principle of true doubt was casually dismissed as not taking account of the APA (JA22-23). In fact, the court held that the general liberal purpose of the statute was adequately served by the easily rebuttable presumptions of the statutes (11a, JA22).

Petitions for rehearing in both cases were denied (47a-50a).

Petitions for writ of certiorari were filed in behalf of Pasqualina Santoro (93-474) with respect to the *Maher* case and the Director, Office of Workers' Compensation

---

[2] Absent a specific statement by the Administrative Law Judge in either case that the evidence was in equipoise (i.e. exactly at most debatable respondent Santoro accepts neither the BRB nor the Third Circuit's interpretation that the evidence was found to be in equipoise nor that the so-called "true doubt" principle is limited to such a situation.

Programs with respect to both cases (93-744). The former petition is pending, the latter petition was granted.

SUMMARY OF ARGUMENT

The principle that doubtful issues of facts should be resolved in favor of the injured employee and his family has long been a fixture of interpretation of the Longshore and Harbor Workers' Compensation Act, as being consistent with congressional intent, the purpose of the Act, and its exemption from the formality of common-law rules. The identical policy and principle of "true doubt" was engrafted onto the BLBA in 1972, along with certain other provisions of the Longshore Act.

Therefore, the proposition advanced by the court below that the claimant under both Acts, must demonstrate his case by a preponderance of the evidence is a novel one.

Further, the lower court's utilization of Section 7(c) as the basis of a requirement of preponderance of the evidence absent Congressional exception, is significant in that the requirement would be spread throughout the multitude of Federal administrative proceedings subject to the APA. This holding seriously misconstrues Congress' intention in enacting the APA.

It was the intent of the Congress to ensure that there existed a minimal procedure across the Federal administrative system. Congressional concern was particularly directed at agency action against an individual, whether person or business entity, (as opposed to controversies between private parties), wherein the agency made its determination based upon a policy or prejudice as opposed to "reliable, probable and substantial" evidence. Further, while Congress did intend that the evidence should be measured against a standard of proof or persuasion, it was not Congress' intention to establish a unitary standard for all cases or all stages of proceeding. Congress had no intent to alter the authority of the agencies and the courts to allocate the burden of persuasion,

based upon a wide variety of statutes, Congressional intent, social policies, and the complexities of individual facts.

In interpreting the APA, the courts, including this Court have uniformly interpreted Section 7(c) as allocating only the burden of production of evidence, not that of ultimate persuasion. This Court has also recognized, however, that Section 7(c) can be used to protect the agency from imposition of a burden of proof of greater than preponderance of the evidence, *Steadman v. SEC*, 450 U.S. 91 (1981). It was not Congress' intention that the APA should vitiate the long standing policy of the Longshore Act that doubtful factual issues should be resolved in favor of the injured worker or his family. Fact-finding in the context of the so-called "true doubt" rule fully comports with the APA because the resulting decision is based upon a reasoned interpretation of all the evidence in the entire record. In the context of case under the LHWC or the BLBA no more is required.

The pervasive legislative, judicial and social policy is that workers' compensation statutes in general and the LHWC and BLBA, in particular, are subject to a liberal interpretation and fact-finders under both Acts have uniformly applied the principle that doubtful factual issues should be resolved in favor of the injured employee and his family. In the case of Longshore claims there is a long judicial history supporting this policy and the courts have logically applied the same principle to the BLBA. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1986); *Freeman United Coal Mining Co. v. OWCP*, 988 F.2d 706, rehearing den. 999 F.2d 991 (7th Cir. 1993).

A basic characteristic of proceedings under these workers' compensation statutes is that the department is not "bound by common-law or statutory rules of evidence or by technical or formal rules of procedures . . . " This exception applies to "investigation or inquiry or conducting a hearing". 33 U.S.C. 923(a). While the principle of true doubt could well be analyzed in terms of

technical rules of evidence, it may well be that it can be as well understood as a function of the informality of procedure not only in hearings but in all stages of the claim process, the purpose of which is the prompt and inexpensive determination of rights of the parties. The principle that doubtful factual issues should be resolved in favor of the claimant is not merely a proposition of evidence but one that is intimately linked with the statutory purpose and implementation of the Acts. The principle of doubt in no way violates the substantial rights of the employer because in a disputed case the evidence is still examined in an even handed and fair manner and both the claimant and the employer are subjected to identical standards of proof and persuasion. The principle of true doubt is only a deadlock breaking device and in no sense a substitute for evidence.

As such it is a recognized adjunct of the Acts and one that is needed to right the economic imbalance between the injured employee and employer.

ARGUMENT

POINT I

THE PRINCIPLE THAT DOUBTFUL FACTUAL ISSUES SHOULD BE RESOLVED IN FAVOR OF THE INJURED EMPLOYEE AND HIS FAMILY DOES NOT CONTRAVENE THE ADMINISTRATIVE PROCEDURE ACT

The opinions of the Third Circuit, stripped to essentials, hold that in all administrative proceedings subject to the APA the proponent of an order (and always the claimant in a workers' compensation case) at all stages of the proceeding bears the burden of ultimate persuasion and must prove his or her case by a preponderance of the evidence and only Congress can exempt from this rule, the agencies themselves and the courts being stripped of their power to determine standards of proof and burdens

of persuasion based upon often very delicate policy considerations and interpretation of the individual statute. In the view of the circuit court a manufacturer striving to keep an insecticide on the market, (*Environmental Defense Fund v. EPA*, 584 F.2d 498 (1st Cir. 1976) cert. denied 434 U.S. 925 (1977); a stock broker accused of fraud (*Steadman v. SEC*, cited above); an employer accused of anti-union animus (*NLRB v. Transportation Management*, 462 U.S. 393 (1983) and the workers' compensation claimant all come before a hearing officer with identical burdens of proof which are maintained throughout the proceeding. It is claimed that Congress intended to deprive the courts of their traditional function to determine the questions of burdens of persuasion and standards of proof based on application of widely varying statutes and policies applied by expert fact-finders. If permitted to stand, this holding would have a devastating impact on the federal administrative system in general and the Workers' Compensation system in particular.

More particularly, it is contrary to the clear reading of the statute, congressional intent, and the holdings of this Court interpreting the APA.

A. The Plain Reading of the Relevant Statutes

Two sentences of Section 7(c) of the APA (5 U.S.C. 556(d)) are at issue.

The first sentence reads:

> Except as provided by statute, the proponent of a rule or order has the burden of proof.

The courts have uniformly interpreted that sentence as applying only to the burden of going forward with evidence, not burden of proof or persuasion, although the cases do not base their holdings solely on that sentence, *NLRB v. Transportation Management*, 462 U.S. 393 (1983);

Environmental Defense Fund v. EPA, 584 F.2d 498 (1st Cir. 1976) cert. denied 434 U.S. 925 (1977); *Bosner v. U.S. Department of Agriculture*, 754 F.2d 804 (9th Cir. 1984); *Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972).

What is significant about this sentence is that it is the only sentence that requires legislative exception. Cong. Rec. 3/25/46, *Letter of Attorney General Tom Clark and Appendix to Revised Committee Report of 10/5/45*, quoted, U.S. Congress, *Legislative History, Administrative Procedure Act*, 1944-1946, U.S. Printing Office, 1947 (hereinafter *History*), at page 411. The term proponent is not identified. In workers' compensation proceedings under the Acts, far from clear who the proponent is. Referral of a case to the administrative law judge is made by the District Director, all parties submit pre-hearing statements and the ALJ addresses the issues raised in the pre-hearing statement, 20 CFR 702.316, 702.317, 702.338. The ALJ is to determine "the rights of the parties," 20 CFR 702.339. These provisions are incorporated into the BLBA (30 U.S.C. 932(a)). In a formal hearing under the relevant Acts each party is a proponent of an order in their respective interest.[3]

The third sentence of that subdivision requires that no sanction, rule, or order be issued except "on the whole record" and "in accordance with the reliable, probative, and substantial evidence." The plain reading of that sentence reveals two things: 1. Congress did not specify which party or if any party has the burden of producing

[3] For example, a considerable number of loss of hearing claims have been filed against respondent Maher Terminals and in many of these cases Maher Terminals has filed a pre-hearing statement to request a formal hearing before the claimant has done so and in some cases the claimant has not requested a formal hearing at all. It is Maher who is requesting an order.

the requisite evidence but describes the type of evidence required and 2. does not state (unlike the first sentence) who has the burden of producing that or any evidence. It is particularly to be noted that Congress could have used one of the standard labels of the burden of proof, such as preponderance of the evidence but did not do so.

Also of relevance is Section 10(e) of the APA (5 U.S.C. 706(2)(e)) providing for judicial review, inter alia, of orders unsupported by substantial evidence upon the administrative record where the agency is authorized by statute to hold hearings. The Section is of relevance because of the use of the term "substantial evidence". That the term "substantial" means the same in both sections was strongly suggested by Congress. With respect to Section 7(c) it was stated:

> The proof must be substantial, as provided in this section and also in Section 10(e) where the term 'substantial evidence' is discussed later in this report.

H.R. Rep. 1980 79th Cong. 2nd Sess. quoted *History* page 27.

B. The Intent of Congress in Enacting Section 7(c) and the APA Generally

The Administrative Procedure Act was passed in 1946 after 10 years of consideration and deliberation, SR 752 Cong. 1st Sess., page 1. The legislative history of that Act makes clear that if the statutory purpose, generally, was as follows:

1. To ensure some minimal procedural safeguards across all federal agencies, without changing the procedures of those federal agencies with mature administrative process; 2. a primary purpose of Section 7(c) was to protect the individual or business from determinations of federal agencies not based upon evidence of the requisite

type; 3. In 10(e) to ensure judicial review and to eliminate the scintilla of evidence review standard that had been used in some cases and to replace it with a more common substantial evidence standard, Letter of Attorney General Tom Clark and Appendix, quoted *History*, pages 229-231.

It was decidedly not the intent of Congress to enact a single burden of persuasion, imposed across the entire federal administrative system and exempt same from agency or judicial interpretation, as the Third Circuit appears to believe. Congress had a good reason for leaving the language of Section 7(c) vague. Had Congress intended such a dramatic change, it would be reasonable to expect that it would have so stated clearly, unequivocally, and a number of times over the lengthy period this legislation was considered.

Keeping in mind that many of the hearings under the APA involved the rights of an individual or business as against government agency, Congress was concerned about the arbitrary rejection of evidence. For example:

> Whenever the burden of proof is upon private parties to show right or entitlement to privileges, permits, benefits, or statutory exceptions, their competent evidence (other than opinions or conclusions) to that effect shall be presumed true unless discredited or contradicted by other competent evidence.

H.R. Rep. 339, 79th Cong. quoted *History*, page 143.

and

> For example, credible and credited evidence submitted by the applicant for license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence.

SR 752, Senate Committee on a Judiciary, 11/19/45, quoted *History*, page 208.

Thus:

> It [Section 12] provides that requirements of evidence procedure are to apply equally to agencies and private persons, except as otherwise provided by law.

Cong. Rec. 3/12/46 (Senate), Senator McCarran, Chairman of Senate Judiciary Committee, quoted *History*, page 324.

> Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it.

Id. page 321.

The Third Circuit placed heavy reliance on an incomplete quotation from Congressman Walter, Chairman of the House Judiciary Committee (JA20) – almost the only time the word "preponderance" turned up in all these years of congressional deliberations. The quotation in context is:

> The first and second sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a prima facia and substantial case, he will prevail unless his evidence is discredited or rebutted. In any event, the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgement on the whole record in accordance with the proofs adduced. The proof must be substantial, as provided in this section and also in section 10(e) where the term "substantial evidence" is discussed later in this report.

H.R. Rep. 1980, 79th Cong. 2nd Sess., quoted *History*, page 269.

Congressman Walter did not give us his definition of "preponderance" and did not say whether he was talking about a strict common law preponderance of the evidence standard.

An earlier comment by Congressman Walter clarify what he meant:

> The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity . . . under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference.

Cong. Rec. 5/24/46 (House), quoted *History* page 365.

Senator McCarran in a parallel report to the Senate did not use the term preponderance of the evidence but stated:

> There are no real rules or probity and reliability even in courts of law, but there are certain standards in principles – usually apply tacitly and resting mainly upon common sense – which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings.

Senate Judiciary Committee, SR 752, 11/19/45, quoted *History*, page 208.

In other words, the standard of evidence is fairness and practicality, whatever may be the label put upon it.

Congressional intention also makes clear that the third sentence of 7(c) was deliberately left vague as to who had the burden of proof. In other words, whatever may be the standard of evidence used by the agency, that same standard must be applied to both parties. Thus:

> Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponent of the denial or relief must sustain such denial by that kind of evidence.

H.R. Rep. 180, 79th Cong. 2nd Sess., quoted *History*, p. 15.

The Senate used nearly identical language, SR 752 79th Cong. 1st Sess., quoted *History*, page 208.

Thus, the provisions of Section 7(c) are meant as a guide to the agencies, subject to judicial review under 10(e) of the Act (Cong. Rec., House, 3/25/46, Letter of Attorney General, quoted *History*, page 22).

In summary, it was Congress' intention not to precisely define evidentiary standards but to ensure that such standards existed, conformed to basic concepts of fairness, and that agency determinations were based upon that evidence.

Thus wholly missing is any suggestion that it was the intent of Congress to remove the previously recognized authority of the agencies, or absent agency action, the courts to regulate matters such as burden of proof.

An earlier proposed version of 7(c) makes clear the intended flexibility of the burden of evidence and persuasion:

> (h) RULES OF EVIDENCE – Immaterial, irrelevant, and unduly repetitions evidence shall be excluded from the record of any hearing and, as nearly as may be, the basic principles of

> relevancy, materiality, and probative force as recognized in Federal judicial proceedings of an equitable nature shall govern the proof of all questions of fact, EXCEPT [emphasis supplied] that such principles shall be (1) broadly interpreted in such manner as to make effective the adjudicative powers of Administrative agencies, (2) shall be adapted to the legislative policy under which adjudications are made, and (3) shall assure that as a practical matter testimony of reasonable probative value will not be excluded as to any pertinent fact.

H.R. Rep. 130, 79th Cong., 1st Sess., quoted *History*, p. 15.

Finally, it is worthy of note that the Longshore Act has, since its inception in 1927 (3/24/27, Chapter C. 509 1.44 Stat. 1424) a mature administrative process of the adjudication of claims (33 U.S.C. 919), for review of compensation orders (33 U.S.C. 921) and procedure before the Deputy Commissioner (33 U.S.C. 923) the latter dispersing with formal rules of evidence in procedure in favor of a determination of the "substantial rights of the parties".

It was not Congress' intent that the APA depart from the type of procedural and evidentiary standards incorporated into the Longshore Act but was primarily declarative of them, including the Longshore Act standard of review, *Crowell v. Benson*, 285 U.S. 22 (1931). The APA was also declaratory of prior law that the agencies were not bound by formal rules of evidence, e.g. *Interstate Commerce Commissions v. Board*, 194 U.S. 25 (1904); *Opp v. Administrator*, 312 U.S. 126, Mod. 312 U.S. 657 (1941); see Cong. Rec. 3/12/46 (Senate), Senator McCarran, quoted *History*, page 320; *Letter of Attorney General*, cited above, quoted *History*, page 412; *Natural Vermont Yankee Power Corp. v. Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

Nowhere in the congressional proceedings is there any evidence that standards of procedure under the Act,

including burden of proof, were a subject of congressional concern, even though claims under the Longshore Act were by that time a significant portion of federal administrative adjudication.

When cases under the Act were made subject to the APA, Congress had no concern about either the procedural or evidentiary standards of the Act.

> It is the committee's belief that the administration of the Longshoremens' and Harbor Workers' Compensation Act has suffered by virtue of the failure to keep separate the functions of Administering the program and sitting in judgement on the hearings.

H.R. Rep. 92-1441, 92nd Cong. 2d Sess. 1972, quoted U.S.C.C.A., pg. 4708.

C. This Third Circuit Has Misread Both the Plain Language of Section 7(c) of the APA and this Court's Interpretation of Same

In the case of *Maher Terminals v. Santoro*, (and more vaguely in the matter of *Greenwich Collieries v. Ondecko*), the Third Circuit misread the plain language of Section 7(c) in that it attempted to pull out of the third sentence of 7(c) a strict common law preponderance of the evidence rule and require legislative exception thereto (JA24) despite the fact that it is only the first sentence of Section 7(c), determining burden of going forward with evidence, that requires such legislative exception. For reasons above noted, the court quoted in isolation the legislative history using the terminology "preponderance" (JA20) and endeavored to rationalize out of existence the same congressional report stating that both parties had the same burden of proof (JA18-19). The court's reasoning was that Congress could not have meant this because "an order in favor of the claimant will

issue that is not supported by preponderance of the evidence, . . . " (JA19). This, of course, begs the question since that is the very point at issue.

In *Maher*, the lower court endeavored to reconcile *NLRB v. Transportation Management*, 462 U.S. 393 (1983) with *Steadman v. SEC*, 450 U.S. 91 (1981) by endeavoring to read *NLRB* out of existence. In *Greenwich Collieries v. Ondecko*, the court relied on an unusual reading of *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987).

At first blush, there appeared to be a conflict in this Court's interpretation of Section 7(c) in *Steadman v. SEC*, cited above, and *NLRB v. Transportation Management*, cited above. However, the two cases can be harmonized by placing the cases in the context of their particular holdings and in the context of other cases of this court.

In *Transportation Management* this Court held unequivocally that the agency had the authority to shift the burden of persuasion, by a preponderance of the evidence, to the employer on the validity of reasons for termination after a showing of anti-union animus. The court was specific that Section 7(c) controlled only the burden of producing evidence. Certainly the court was interpreting the first sentence of 7(c) but it is equally clear that the language of the third sentence thereof was not regarded as controlling as to the right of the agency to shift its burden of persuasion in the absence of legislative exception. Further, the court did not derive the preponderance of the evidence standard from Section 7(c) but from the agency's interpretation of its own statute.

The Third Circuit's attempt to distinguish this case by suggesting that there was involved an affirmative defense, begs the question because the employer's burden was denominated as an affirmative offense precisely

because the burden of persuasion was placed on the employer.

In *Steadman v. SEC*, cited above, the agency itself used a preponderance of the evidence standard in proceedings against the broker who argued that a standard of "clear and convincing" evidence should be utilized due to the harsh results (loss of livelihood) resulting from the order.

This Court undertook a close analysis of Section 7(c) and concluded that the agency's compliance with Section 7(c) protected the agency from imposition of a stricter standard of proof. The holding would conflict with *Transportation Management* if 7(c) were used to override the agency's selection of a standard of proof. What is significant about *Steadman* is that it, like *Transportation Management*, upheld the authority of the agency to determine standards of persuasion within the confines of the APA.

The Court's interpretation in *Steadman* centered around the phrase in the third sentence of 7(c) "in accordance with the reliable, probative and substantial evidence" and concluded:

> Nor is there any suggestion in the legislative history that a standard of proof HIGHER [emphasis supplied] than a preponderance of the evidence was ever contemplated, much less intended.

450 U.S. 91, 102-103.

The core of the *Steadman* analysis is that the third sentence of 7(c) requires a weighing of the evidence against the standard. No argument is had with this proposition nor is there any argument with the proposition that absent congressional, agency or court action, the default standard of proof could be the preponderance of the evidence. The term "default" is used because 7(c)

does not contain the terminology "preponderance of the evidence" nor was that section intended to change existing rules respecting burden of proof. The wording of Section 7(c) is more compatible with the requirements that the evidence should be balanced against some standard meeting the minimum requirements of Section 7(c) as well as a review requirements of 10(e), assumed to be the preponderance of the evidence standard only when that standard is specifically used by the agency, when there is silence on the subject or where, as in *Steadman*, there is an endeavor to impose a stricter standard. There is no language in *Steadman* limiting the authority of the agency or the courts respectively to alter the burden of persuasion in certain circumstances and at certain stages of the proceeding. However, *Transportation Management* specifically reaffirms the right of the agency to do so, *NLRB v. Transportation Management*, cited above, 403-405.

It is significant that the court in *Transportation Management* analogized to *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), in which this Court shifted the burden of presumption on an issue in a civil lawsuit, despite the specific statement in rule 301 of the Federal Rules of Evidence (that a presumption "does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast"). *Transportation Management*, appeared to reason that if the very specific language of rule 301 did not prevent this Court from shifting the "customary burden of persuasion in a manner that otherwise would be permissible"

(*Transportation Management*, pg. 403, note 7) then neither should less specific language of Section 7(c).[4]

Also significant is the reference in *Steadman* to Justice Clark's (he being the attorney general at the time of the enactment of the APA) dissent in *Woodby v. INS*, 385 U.S. 276 (1966) in which it was suggested (unsuccessfully against the establishment of a higher standard of proof in a non-APA case) that Section 7(c) and 10(e) of the APA have "traditionally been satisfied when the agency decides on preponderance of the evidence." *Id.* at 289-91, note 1, quoted *Steadman*, 102, note 22, suggesting that both justices were discussing a minimum or "default" standard of proof. The majority in *Woodby* despite statutory language broadly similarly to Section 7(c) (8 U.S.C. 1105(a)(4) and 1252(b)(4)) impose a stricter burden of proof on deportation proceedings stating:

> It is the kind of question which has traditionally been left to the judiciary to answer . . .

Woodby, Id. at 284.

The final significant case is *Mullins Coal Co. v. Director, OWCP*, cited above, which was interpreted by the Third Circuit as independently mandating a standard of preponderance of the evidence in BLBA cases, independently of the APA based on interpretation of Department of Labor regulations (11a, note 4).

---

[4] The issue of the presumptions of Section 920 of the Longshore Act is not before this court as the ALJ specifically found the presumption in the *Maher* case to be rebutted (32). However, it should be noted that such findings are typically made on the "bursting bubble" theory of presumption, *DelVecchio v. Bowers*, 296 U.S. 280 (1935). *Mt. Healthy*, and its treatment in *Transportation Management* suggests the possibility that the Department of Labor or the courts, could strengthen the presumption of Section 920 as some circuit courts have attempted to do, e.g. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980).

How the Third Circuit could reason in *Greenwich Collieries* that the Department, independently of the APA, is able to determine the burden of persuasion by regulation in a BLBA case and is not able to do so in a Longshore case is something respondent cannot possibly understand, as the adjudicative provisions of the Longshore Act wholly apply to the BLBA, 30 U.S.C. 932(c).

Equally difficult to understand is how the lower court could extract a preponderance of the evidence standard from the following BLBA regulation:

> The burden of proving a fact alleging connection with any provision of this part shall rest with the party making such allegations.

20 CFR § 718.403 (1992). That regulation is irrelevant to the issue because no one denies that the respective parties are obliged to prove the facts making out their respective position. As is more fully discussed in Point II hereof, the principle of doubt comes into play only in resolving the ultimate inference from the facts already proved. In addition, the language of the regulation "the burden of proving a fact" is not significantly different from the term "burden of proof" contained in Section 7(c) which has been interpreted as the burden of going forward with evidence, i.e. producing the parties evidence to prove the relevant facts, *see NLRB v. Transportation Management* and generally cases cited *supra*.

In any event, the court in *Mullins Coal v. Director OWCP*, cited above was interpreting the "interim presumption" of 20 CFR 203(b), no longer in effect at the time Mr. Ondecko filed his claim, 30 U.S.C. 931, Part C et seq. In that case the Department interpreted its own regulation as requiring proof by a preponderance of the

evidence of one of the qualifying criteria of pneumonoconiosis as its language required consideration of all relevent evidence, 20 CFR 727.203(b).

A close reading of the facts of *Mullins* reveals that the Secretary's interpretation of the regulations actually imposed a heavier burden on the claimant than a general preponderance of the evidence standard. Both the claimant's evidence and conflicting evidence had to be considered and the claimant's evidence preponderate in determining if there was a prima facie case and the presumption arose, *Mullins, Id.* at 158, 160. This standard is stricter than the usual case of presumption wherein the one in whose favor the presumption is created is entitled to prove the facts giving rise to the presumption, independently of contrary evidence, and only then is it determined if the contrary evidence is adequate to rebut the presumption, *see DelVecchio v. Bowers*, cited above, and Federal Rules of Evidence, 301.

Of significance is the fact that this Court upheld the authority of the Secretary to interpret his own regulation and did so independently of the provisions of the APA. Further, assuming arguendo that the APA did impose a general burden of persuasion, then the court could have decided the case without further inquiry. Rather the Court based its holding on the Secretary's interpretation of his regulation. The Court specifically noted the secretary's adherence to the "true doubt rule", although the issue was not applicable to the case, *Mullins, Id.*, 145, note 12.

Nearly contemporaneous with this holding in the instant case the Seventh Circuit, in a case wherein the true doubt rule was at issue, held it not to contravene the APA, *Freeman United Coal Mining Co. v. OWCP*, 988 F.2d 706, *rehearing den.* 999 F.2d 991 (7th Cir. 1993). The Fourth

Circuit affirmed the rule that the "true doubt" principle does not have a property of affirmative evidence and can be used only in the case of doubt only in the mind of the fact-finder, *Grizzle v. Pickinds Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993). An identical finding has been made with respect to the "true doubt" principle under the Longshore Act, *Sprague v. Director, OWCP*, 688 F.2d 826 (1st Cir. 1982).

These cases, read together with congressional intent, indicate that it was not the primary intent of the APA to impose a rigid uniform preponderance of the evidence standard and that, irrespective of whether or not there is a general standard of persuasion applicable, the agencies and courts respectively were not thereby deprived of their traditional authority to allocate burden of persuasion on certain issues and at certain stages of the proceedings.

D. The Utilization of the "True Doubt" Principles by the Administrative Law Judges Herein Does Not Contravene the APA.

Section 7(c) essentially requires that an order or sanction be based upon evidence adduced and upon review of the entire record with provision of judicial review, pursuant to Section 10(e) only to determine if the evidence be "substantial".

These were the standards of Longshore adjudication and review before the passage of the APA, *see generally* 33 U.S.C. 919 and 921, *Crowell v. Benson*, 285 U.S. 22 (1931); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932). After the Longshore Act was made subject to the APA, this review standard was maintained independently.

Therefore, there was no need for Longshore claims to be made subject to the APA at its enactment in 1946 and when they were so subjected to in 1972, Congress' motivation was not any discontent with the adjudicatory process but to prevent the conflict inherent in the Director being both administrator and adjudicator of claims under the Act, H.R. Rep. 92-1441, 92nd Cong. 2nd Sess., quoted U.S.C.C.A., pg. 4708.[5]

The ALJ decisions in both these cases conform to the APA because they are solely based upon a reasoned review of the evidence in the entire record. In *Maher Terminals*, Administrative Law Judge Silverman exhaustively discussed the medical testimony, other medical records, and all the possible inferences arising therefrom (JA37-50). At that point the ALJ notes:

> This record presents the unenviable task of resolving the ultimate issue from conflicting probative evidence. It is an arguable case in which the rule that doubt concerning evidentiary conflict should be resolved in favor of the Claimant is denied applicable.

(JA50). It is to be noted that although there was an expression of doubt, it was not noted that the evidence was absolutely in equipoise. It is further to be noted that the ALJ then undertook a further discussion of the evidence (JA50-55) in which he further discussed the testimony of the claimant's attending physician Dr. Yazden, noting the unbroken history of neck pain and that Dr. Derby's assertion that the condition was not known to be aggravated by trauma was not claimed to be backed up by any statistical studies. Only then did the ALJ note that

---

[5] A conflict of interest that still occurs in cases of a claim against the special funds under 908(f) or against a defunct employer or carrier under 918(b).

acceptance of the employer's position that the spontaneous and abrupt escalation of the underlying condition, after existing for many years, was purely fortuitous would be "inconsistent with the purposes in policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant" (JA55).

Congress intended that administrative decisions should be based upon a review of evidence in the record as a whole and Judge Silverman clearly complied with that requirement.

In *Greenwich Collieries,* at first blush one could wish that Administrative Law Judge Rosensweig had provided additional reasoning for her selection of Dr. Dandrea's and Ignacio's opinions over those of the employer's doctors (43a-44a). But one quickly also realizes that it is difficult to wax either eloquent or analytical over a numbing quantity of x-rays and pulmonary function studies that seem the standard mode of defense in Black Lung cases, the theory apparently being that the greater weight of evidence consists of evidence that weighs more. The ALJ was trying to look beyond this multitude of tests to the realities of the situation: that the doctors who best knew Mr. Ondecko, having treating him over a period of years, were the best qualified to judge his condition (38a-39a, 43a-44a). It was concluded:

> I find the fact that the Claimant's treating physician considers him totally disabled to raise true doubt in face of the Employer's expert opinions.

(44a). This conclusion was reached only after an exhaustive review of all exhibits, medical reports, and testimony. (26a-36a).

It cannot be disputed that these decisions are based upon careful review of all the relevant evidence, the

balancing of conflicting evidence, and that the ultimate inference is supported by substantial evidence since in each case the claimant had the benefits of expert medical testimony unequivocally affirming causation. (39a, JA55).

Therefore, if judicial and/or Agency interpretation justify resolving doubtful factual issues in favor of the injured employee and his family (and that clearly is the interpretation of the Department of Labor and every circuit court case but the instant) then nothing in 7(c) or other provision of the Administrative Procedure Act invalidates that determination.

POINT II

THE PRINCIPLE THAT DOUBTFUL FACTUAL ISSUES SHOULD BE RESOLVED IN FAVOR OF THE WORKMEN AND HIS FAMILY COMPORTS WITH THE UNDERLYING PURPOSE, PROCEDURE AND READING OF THE ACTS AND LIES WITHIN THE DISCRETION OF THE FACT-FINDER

The essential difficulty with the Third Circuit's mechanistic interpretation of the APA, LHWC and BLBA, is that it would roll back a 75 year history of administrative adjudication and place the injured employee back into a common-law courtroom required to prove his case by the "material allegations of the complaint" (11a, JA22) by a preponderance of the evidence. (An amended version of the *Maher* decision substitutes the word "claim" for "complaint", see Petition in 93-474 at A14).

This approach wholly misconstrues the statutory and procedural implementation of the respective Acts and workers' compensation statutes in general. The simple undebatable fact is that the compensation claimant is not a common-law plaintiff, the compensation claim process not a lawsuit and the recovery, if any, is not of tort

damages but of benefits Congress has granted the injured employee and his or her family.

The principle of true doubt is not primarily a function of mechanistic rules of evidence or burden of persuasion (itself an expression of policy) but the expression of a longstanding social policy, a principle of interpretation of the Acts and a token of the degree of discretion accorded the Department of Labor in fact-finding of disputed issues.

A. The goal, nature and implementation of the respective Acts.

The non-jurisdictional provisions of the LHWC, extended generally to the BLBA, were lifted bodily, and, in many cases almost verbatim, from the New York Workers' Compensation Law, *Laws of the State of New York L1913 c. 816; L1914 c. 41; L1922 c. 615.*

Congress' intention was to provide to certain maritime employees the type of workers' compensation system that the several states had provided and was required by this court's holding in *Union Pacific Railway v. Jensen*, 244 U.S. 205 (1917).

Rather than "re-invent the wheel", Congress adopted the New York procedural approach broadly and the essential substantive scheme noting:

> The bill follows in the main New York State compensation law, which is considered one of the best due to the fact that it was drafted after the most careful investigation by experts and others . . .

H.R. Rep. 1190 5/13/22, pg. 2, 67th Cong. 2nd Sess.

Congress' intention was no different than that of New York's:

> Workmen's compensation has come to be universally recognized as a necessity in the interest

> of social justice between the employer and employee. It is the modern substitute for the old common-law remedy afforded through actions at law for damages and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness . . .

H.R. Rep. 1769, 1/14/27, pgs. 19-20, 69th Cong. 2nd Sess.

and

> The important principles of compensation are promptness in payment and simplicity in procedures . . .

H.R. Rep. 739, pg. 4, 1/31/22, 67th Cong. 2nd Sess. Like the New York statutes, there were provided benefits (not damages) through a procedural system unknown to the common-law. From today's perspective, its revolutionary nature is difficult fully to appreciate.

At the heart of the entire compensation system in this country there lies a trade off or "bargain". The employee gives up his right of common-law action against the employee, *McKinneys New York Worker's Compensation Law, Section 10;* LHWC 33 U.S.C. 905(a). While the employee can sue a responsible third party a duplication of recovery is prevented, *N.Y.W.C.L. Section 29;* LHWC 33 U.S.C. 933(a). Of course, the maritime employee also has certain maritime remedies, which were further severely restricted by the 1972 amendments, in return for a liberalization of benefits, *see generally* H.R. Rep. 92-1441, 97th Cong. 2nd Sess.

This bargain was best described in an early New York case:

> This Act protects both employee and employer, the former from wasteful suits and extravagant

> verdicts, the latter from the expense, uncertainties and delays of litigation in all cases and from the certainty of defeat if unable to establish a case of actionable negligence. Both Acts [1911 and 1914] are said to have been based on the proposition that the risk of accidental injuries in a hazardous employment should not fall on the injured employee and his dependants who are unable to bear it or to protect themselves against it.

Jensen v. Union Pacific Co., 215 N.Y. 518, 524 (1915) rev'd on other grounds sub. nom. *Union Pacific Railway v. Jensen*, cited above.

What the injured employee and his family obtain in return for giving up these substantial rights is the hopefully prompt payment of wage replacement benefits and in an amount far less than he would have received in "damages" in a suit at law or admiralty (*see generally* 33 U.S.C. 906, 908 and 909) and medical care (907) "payable irrespective of fault as a cause of the injury" 33 U.S.C. 904(b).[6]

The goal of speedy delivery of this lesser benefit, was to be effectuated in a two-fold manner:

1. By the abolition of common-law and statutory rules of evidence and procedure and; 2. The finality of administrative determination as to facts. However these

---

[6] Against the claim of respondent *Maher* (Brf. pg. 30), the amount paid to the widow is less than she would have received had her spouse lived. Certainly the BLBA affords the mine owners greater financial protection than would be afforded if their employees had their common-law rights arising out of conditions caused by exposure or deadly mineral dust. This "deal" has not always and necessarily benefitted the employee.

goals necessarily import a principle of liberal interpretation in favor of the employee and his family, as was early recognized. For example:

> All of the provisions of the Act indicate a clear intention that the facts shall be speedily determined by the deputy commissioner to that compensation may be awarded without the delay usually incidents in the courts.

Crowell v. Benson, cited above at 27.

> It is intended that the burden of error shall fall on the employer, who is best able to bear it.

Jensen v. Union Pacific Co., (Court of Appeals case) cited above at 524.

This court further stated:

> Such laws [workers' compensation statutes] operate to relieve persons suffering with such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them.

Baltimore & Philadelphia Steamboat Co. v. Northern, 284 U.S. 408, 414 (1932). Also *see generally Larson*, "The Law of Workmen's Compensation", 1-9 (Section 2.20).

Thus, Congress enacted Section 923(a) exempting the statute from "common-law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act;" the goal not being to determine who prevails but "best ascertain the rights of the parties". (This provision is substantially taken from Section 113 of the New York Workers' Compensation Law). Its purpose was interpreted by the New York courts as protecting the claimant against technicalities, *Ziegler v. P. Cassidy's Sons*, 220 New York 98, 102 (1917); *see also Crowell v. Benson*, quoted above, page 27.

The second essential prong of this statutory scheme is the finality of fact-finding by the deputy commissioner

(also as of 1972 the hearing examiner or administrative law judge, Section 919(a)-(c)), while preserving the right of judicial review and, as of 1972, providing agency review.

This court thus stated this statutory scheme:

> to furnish a prompt continuous, expert and inexpensive method for dealing with a class of questions of facts which are particularly suited to examination and determination by an administrative agency . . .
>
> and
>
> the efficacy of the plan depends upon the finality of the determination of fact.

Crowell v. Benson, cited above, pages 46-47.

Thus, Congress enacted an administrative system having little resemblance to a common-law or admiralty action, see generally 33 U.S.C. 919. There exists an informal conference procedure, see generally 20 CFR 702.101-.319 with resort to a formal hearing before an administrative law judge in the event the district Director is not able to resolve the dispute (see generally 20 CFR 702.331 et seq.) However, it is important to note that the Act contemplates voluntary compliance by the employer or carrier, who is required to file a report of injury (930(a)), voluntarily commence payment of compensation within 14 days or controvert the case and notify the deputy commissioner of his action (914(a)) and pay medical voluntarily (907(a)) (an unappreciated function of the presumptions of Section 920(a) of the Act is administrative convenience: the deputy commissioner is able in uncontested matters to legally take appropriate action without the need of testimony).

Thus, the formal hearing procedure is but one part of the hearing process and not necessarily the major part.

Indeed, it is open to question what percentage of cases are ever contested at all.[7]

This entire statutory scheme (with initial fact-finding until 1972 solely by the deputy commissioner) led to an early and continuing recognition that the Act, like its sister act in New York, was remedial in nature, whose provision should be liberally construed so as to achieve its benevolent purposes, goals aided by informality of procedure and finality of fact-finding, *Petrie v. Onedia Steel Pully Co.*, 215 N.Y. 335 (1915); *National Biscuit Co. v. Fogarty*, 215 N.Y. 20 (1917); *Baltimore & Philadelphia Steamboat Co. v. Northern*, cited above, *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *Voris v. Eikel*, 346 U.S. 328 (1953); *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977).

The purpose of this lengthy recitation is not to urge a principle of blind liberality but to demonstrate the close inter-relationship between Congress' goals in enacting the Act and the principle of liberal interpretation, without which these goals cannot be accomplished. A secondary purpose of this recitation is to highlight that the process herein is not akin to a common-law lawsuit and the parties are not precisely like a personal injury plaintiff and defendant. Once the claimant establishes certain jurisdictional facts, he comes into the compensation process with a strong legislative and judicial policy that he should, if warranted, be compensated. It may well be the introduction of the formal hearing system 919(d) and 20

---

[7] The informal aspects of this procedure may be less clear in BLBA cases which, like most occupational disease claims, commence with a filing of a claim by the employee rarely followed by immediate and voluntary payment. Nevertheless, there must be assumed that at least some of these cases are resolved without a formal hearing.

CFR 702.331 et seq. create the appearance of a common-law courtroom, but the reality is otherwise. While the formal hearing process is only a part of the entire compensation claim process, any finding of this court as to burden of proof or persuasion perforce would apply to the entire claim process.

After an earlier unsuccessful effort, the BLBA was incorporated into this statutory scheme in 1972, 30 U.S.C. 932(a). Also specifically incorporated therein was the longstanding principle of liberal interpretation in favor of the employee. The congressional reports pulse with compassion and manifested a determination to compensate:

> miners and the widows and children of miners whose lives and health have been sacrificed in the production of that critical energy source coal.

SR 90-743, 92nd Cong. 2nd Sess. (1972), quoted U.S.C.C.A. pg. 2305, H.R. Rep. 92-460; *Mullins v. Director, OWCP*, cited above. It is obvious that this principle of liberal interpretation was ported directly from the Longshore and Harbor Workers' Compensation Act.

Against this background, the assertion of the court below that this principle of liberal interpretation is adequately served by the limited presumptions of the Act (11a, JA22) is both novel and retrogressive. Assuming this Court's holding in *DelVecchio v. Bowers*, cited above, the presumptions are easily rebuttable by substantial evidence and are of little assistance to the claimant in a litigated case as "its only office is to control the result where there is an entire lack of competent evidence," *DelVecchio v. Bowers*, cited above, at 286.

B. The principle that doubtful factual issues should be resolved in favor of the injured employee and his or her family has been consistently applied to cases under the Act.

There is a perfect symmetry to the proposition that just as doubtful provisions of the statute should be construed in favor of the injured employee and his or her family so too should doubtful factual issues. The Act itself (923(a)) as well as Section 7(c) of the APA are silent as to precise burdens of persuasion. Section 923(a) itself frees the fact-finder of common-law statutory rules of evidence or procedure except as the Act itself provides and accords the fact-finder (be it the ALJ or district director) with exclusive authority to weigh evidence, and make credibility determinations, or draw inferences and draw conclusions. These determinations are not subject to review provided they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. 921(b)(3). That certain of the "true doubt" cases have confused the standard of review with the standard of fact-finding and does not undermine the validity of their conclusions or their consistency.

Thus, the courts from an early date recognized the principle, and stated it broadly, that doubtful factual issues should be resolved in favor of the employee. Many of the cases merely stated this as a general expression of principle or policy e.g. *Southern S.S. Co. v. Norton*, 101 F.2d 825 (3rd Cir. 1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88 (5th Cir. 1990); *Watson v. Golf Stevedoring Co.*, 400 F.2d 649 (5th Cir. 1968). The earliest case required the deputy commissioner, in the absence of contrary evidence, to resolve the undisputed evidence in favor of the

employee, *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932).

Other cases explicitly discussed an emphatically rejected the concept that the Act put the burden on the claimant to prove his case by a preponderance of the evidence. In *F. H. McGraw & Co. v. Lowe*, 145 F.2d 886 (2nd Cir. 1944), the deputy commissioner had put a memo in file expressing uncertainty as to the correctness and justice of his own decision. The court stated:

> It [the memo] shows merely that the hearing officer had entertained doubt and that in resolving that doubt in favor of the claimant had been somewhat influenced by the policy frequently announced by the courts that doubt be resolved in favor of the injured employee or his dependant family.

8 *Id.* at 888. Thus, at an early date it was determined that the rule was used only after review of the relevent evidence and not as a substitute for review of the evidence.

In other cases awards to claimant were upheld on the evidence that, nearly as a matter of law, was not preponderant in the common-law sense because it was barely sufficient to make out a prima facie case. In *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986) and *Mid Gulf Stevedores, Inc. v. Newsome*, 462 F.2d 185 (5th Cir. 1972) (facts at 33 F. Supp. 162(E.D.Y La. 1971) awards of compensation were upheld where the claimant had no conclusive testimony as to medical causation as against contrary testimony emphatically denying causal relationship. Any argument that the rule was grounded in the presumptions of Section 920(a) of the Act was dispelled in *Strachen Shipyards v. Shea*, 406 F.2d 521, 522 (5th Cir. 1969). The basis of the true doubt rule was squarely placed upon Section 923(a)'s abolition of common-law standards, interpreted in light of the policy of the Act.

A significant discussion of the rule is contained in *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968). In that case an award was upheld against a claim of collateral estoppel due to prior unsuccessful litigation by the claimant against the employer. In upholding the award of compensation, the court stated that collateral estoppel effect could not apply because there were differing standards of proof in a court proceeding as against the workers' compensation proceedings and stated:

> The standard before a jury is the preponderance-of-the-evidence test. Although we cannot attach a legal labor to the burden before the Commissioner, the statutory policy, as interpreted by the courts, indicates that it is a less stringent standard of persuasion.

Id. at 188.

C. It is not necessary to put a label on claimant's burden of persuasion in an LHWC or BLBA case.

It is submitted that the 5th Circuit was wise in expressing a reluctance to put a precise label on the parties' burden of persuasion of the fact-finder beyond stating it is less than that of other civil litigants in courts of record.

These cases do not state the principle of true doubt with the precision the Director utilizes: that in the limited circumstance where the evidence is in equipoise; a finding is required in favor of the injured employee, leaving the burden of ultimate persuasion on the employer (Director's petition, i, 15-16, 17).

Certainly, the claimant would have no argument with the Court's adopting the director's interpretation based upon the agency's own interpretation of the relevant Acts, e.g. *Lessar v. C. F. & I. Steel Corp.*, 3 BLR 163, 1-68

(1981) and the agency's general power to shift the burden of persuasion, *NLRB v. Transportation Management*, cited above, an authority explicitly reserved by the Department based upon the above case, 29 CFR 18.301 (Rules of Evidence, U.S.D.L., Reporters Note).

However, it is believed by this respondent that adoption of the Director's precise position is not required to preserve either a more broad principle of doubt or the validity of the ALJ decisions herein.

The concern here is two-fold. First, it appears that the parties are becoming engaged in discussion and juggling of technical terms, perhaps having little relation to the administrative process, the very sort of thing Section 923(a) of the Act was intended to eliminate from the decision making process to be replaced by a "sound practical judgement" by "an administrative agency especially assigned to that task", *Crowell v. Benson*, cited above at 47. If it is desirable to avoid introducing into the compensation system the technicalities of civil rules of evidence and procedure, now is the time to do so.

Secondly, there is a serious question as to whether there is a need to put a label such as "preponderance of the evidence" on to the fact-finding process of cases under the Act. While it is true that the substantial evidence rule may have prevented the courts from having to specify a "label" it is not coincidental that in the 60 plus year history of the Longshore Act there has been felt no need to do so and yet the administration procedures of the Act have functioned quite satisfactorily, not requiring any significant modification of the standards of fact finding or review since the inception of the statute. This is not to say that such labels may be more useful in the case of Federal agencies vis a vis individual rights e.g. *NLRB v. Transportation Management*, cited above and *Steadman v.*

SEC, cited above and Point I hereof – as opposed to litigation between private parties.

As the cases and authorities make clear, labels such as "preponderance of the evidence" can be of considerable significance as a matter of policy but, perhaps, not terribly crucial to the actual process of fact-finding. Respondent seriously questions if such general labels are of any significant utility whatever in the case of the fact-finding process by expert administrative law judges in a workers' compensation claim.

One need not go as far as one leading authority who questioned any need whatever for labels to measure human belief "for the law cannot expect to do what logic and psychology have not yet done." 9 Wigmore, *Evidence* (Chadbourne rev. 1981), page 415, Section 249.

However, the truth of Justice Harlan's observation must be accepted that labels on evidence such as "beyond a reasonable doubt" and "preponderance" are used to instruct the fact-finder as to the confidence society thinks he should have in his findings. In *Re Winship*, 397 U.S. 358 (1970) thus the labels put on burdens of persuasion represent society's judgement as to the importance of a policy underlying the issue, *Lavine v. Milne*, 424 U.S. 577 (1976); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Woodby v. INS*, cited above.

For example, in an FELA case the burden of going forward is "significantly different from the ordinary common-law negligence action", *Rogers v. Missouri Pacific Railway*, 352 U.S. 500, 509-510. As to social security cases it was stated:

> The extent of a claimant's burden of proof is primarily a matter of policy based upon experience . . . in this connection the Social Security

> Act, being remedial in nature, is generally construed liberally in favor of the claimant if any substantial basis exists for relief . . .

Paul v. Ribicoff, 206 F. Supp 606, 616(D) (Col. 1962) and:

> Courts and legislatures create presumptions for much the same reason as they assign burdens of proof . . . such reasons include: probability, procedural fairness, procedure economy, regularity, convenience, and the implementation of social policy.

Fishman, *Jones on Evidence*, 7th Edition, § 4.4.

Putting labels on burdens, such as "preponderance" on the evidentiary burdens factually, beyond expressing policy, are of little assistance to the fact-finder in actually resolving an individual case. Thus:

> It is a commonplace that in a given case the evidence may suffice or support a finding either way. The finding may be "against the weight of the evidence" and yet be supported by substantial evidence. The fact finder must make a choice based on its own appreciation of the greater probability.

Jaffey, Lewis L., *Administrative Law: Burden of Proof and Scope of Review*, 79 Harvard Law Review, 914, 915.

The terms, such as "preponderance" say little about analysis of the evidence. One authority stated that preponderance may mean one of three things: 1. The fact finder is satisfied that the fact more likely true than not true; 2. Greater weight of the evidence; 3. A combination of one and two, *Fishman*, Op. Cit., Section 3.9.

ALJ Silverman's analysis of the evidence and conclusions therefrom rather vividly illustrate all of these principles because one sees him carefully weighing all of the evidence, attempting to reconcile it, and eventually having to resolve it, not by any labels of evidence, but by the

common sense of the situation. This is precisely what administrator fact-finding is all about.

Labels such as "preponderance of the evidence" are necessary to instruct a jury but are not particularly helpful to an administrative law judge. The term "preponderance" means not only quantity and quality of the evidence but the fact-finder's appreciation of the evidence, e.g. credibility determinations. For example, in both of the involved cases there is a suggestion that the respective administrative law judges resolved the disputed medical testimony by giving preference to the reports of the claimant's attending physicians over those who had examined the claimant on only one occasion, or in the *Santoro* matter, only reviewed records (38a, 43-44a, JA42).[8] It is probably difficult for the fact-finder himself or herself to quantify such intangible factors as bearing upon the ultimate determination, and probably impossible for a reviewing court to do so. To a great extent, "preponderance" may well mean, in an administrative setting, what the fact-finder believes to be most fair and reasonable, provided only it is based upon a review and reflection of the entire administrative record. When Congressman Walter instructed the fact-finder to find "in accordance with the preponderance" (H.R. Rep. 1980, cited above) he was instructing the fact-finder to base the ultimate decision upon what he or she, based only on the

---

[8] This respondent argued before the Third Circuit that a component of the principle of true doubt and a reasonable extension of the liberal purposes of the Longshore Act is that the testimony of the attending physician should be given preference over that of physicians who examined the claimant only once or never during his or her lifetime, (Brief of Respondent Santoro before Third Circuit, pages 26-32) this argument was ignored by the court.

administrative record, believed to be the proper conclusion.

If, however, a label be assigned and, as the above cases suggest it be done in part on policy, then the policy of the Acts herein would justify a label far less acceptable to the employers herein than the limited principle of doubt.

D. The principle of true doubt conforms with Congressional intention, the readings of the acts, does not violate the substantial rights of the parties and is required to implement the policies of the Acts.

Congress clearly recognized a general principle of true doubt as being part and parcel of the policy objectives of the respective Acts. In 1972 Congress put the BLBA within the broad provisions of the LHWC and in so doing stated:

> In the absence of the definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled minor or its survivors.

S. Rep. 743, 97th Cong., 2nd Sess., page 11 (1972).

Thus, the liberality extended not only to the basic entitlement provisions but to the actual fact-finding. In addition, it should be remembered that at this time Congress was undertaking a comprehensive revision of the Longshore and Harbor Workers' Compensation Act and the principle of true doubt had been a fixture of that statute for a long time. Yet, in amending the Longshore Act, Congress did not question the true doubt holdings, but rather grafted then wholly onto the BLBA. It cannot be disputed that Congress impliedly recognizes the principle of true doubt as a fixture of interpretation of the Longshore Act. In summary, the principle of true doubt had long been a part of the environment of Workers'

Compensation in 1972 so that Congress did not hesitate in utilizing that particular terminolgy when the BLBA was placed under the aegis of the LHWC.

The plain reading of Section 923(a) states that the fact-finder will be bound by formal rules neither of evidence nor procedure except as the Act provides. Yet, the Act itself lays down no burden of persuasion but directs the fact-finder to determine the "rights of the parties". That section further states that the rules of evidence to not apply "In making an investigation inquiry or conducting a hearing . . . ". Of the various functions performed by the deputy commissioner or the ALJ one would anticipate the questions of burden of persuasion would come into play only in the case of a hearing yet the statute prescribes the identical informality for all stages of the claim process. The fact that the 1972 amendments separated the administrative and adjudicative functions does not alter the plain reading of the statute and that plain reading does not set forth a specific burden of persuasion nor does it proscribe utilization of the true doubt rule. As above noted, Section 923(a) was taken almost verbatim from Section 113 of the New York Workers' Compensation Law. Contrary to the assertion of responded *Greenwich Collieries*, (Brf. pages 15-16) there is nothing new about the true doubt rule in its broad sense. As early as 1916 there was quoted a pamphlet entitled "German Workmen's Insurance as a Social Institution" by one Ludwig Lass in which it was stated of the world's first workers' compensation statute:

> In the interpretation of the laws and earnest endeavor is shown, above everything, to give material justice its due, while formal jurisprudence has to stand back. In cases where any legal provision is susceptible of several constructions, that interpretation is preferred when

> doubts arise, which corresponds to the intentions of the legislator from the social point of view. There is no anxious clinging to the dead letter; on the contrary, the interpretation is liberal and in keeping with the spirit of the legislation . . .
>
> Further, mention must be made of the fact that in workmen's insurance matters, not the same severe standard is applied by the Imperial Insurance Office to proof, as is customary for disputes in common-law. Thus, proof of probability is often considered sufficient . . . *A similar view is taken by jurisdiction in the numerous doubtful cases where the accident itself, or the connection between the injury or death of an injured person and the accident, cannot be sufficiently proved.* [emphasis applied]

quoted, *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 443-444 (1916) (dissenting opinion).

The principle of true doubt is a function not only of legislative intent and liberal interpretation but of the relaxation of common-law standards explicitly incorporated into Section 923(a), including a less stringent than common-law burden of persuasion. The stated concern of the employers-respondents herein is that the principle of true doubt would lead to decisions based upon policy, not evidence; of decisions going against the weight of the evidence. This is not the case. The principle of true doubt in no way violates rights of the employer. In fact, the employer-petitioner's real argument is with the underlying liberal purpose of the respective Acts.

Both 923(a) of the LHWC and Section 7(c) of the APA do not identify the party having the burden of persuasion. Whatever may be the standard of evidence, it is even-handedly applied to both parties, the goal being to

"best ascertain the rights of the *parties*" [emphasis supplied] § 923(a). Congress tells us that the third Section of 7(c) has the identical provision:

> Similarly the requirement that no sanction be imposed or rule or to be issued except upon evidence of the kind specified means that the proponent of a denial of relief must sustain such denial by that kind of evidence.

H.R. Rep. (1980), cited above, page 37.

The Third Circuit's attempt to read this expression of intent out of existence, asserting that it is impossible for both parties to have the burden of persuasion on the same issue at the same time is unpersasive (JA18-19). The employer does enter the ALJs courtroom on a level playing field with the claimant as both alike are relieved of common-law rules of evidence or procedure. If the claimant can prevail on his case by less than a common-law standard of proof then so can the employer.

Section 7(c) mandates a decision based upon the entire record "in accordance with the reliable, probative, and substantial evidence." As the same evidentiary standard applies to both parties, that statutory description, to a great degree, describes the evidence that the finder of fact, in his discretion, accepts as the more reasonable.

In the usual case, the claimant generally is the "proponent of a rule or order" (sentence 1, Section 7(c) and has the burden of producing evidence so as to make out a prima facia case. If the claimant does not make out a prima facie case then the ALJ may rule against the claimant even if the employer produces no evidence. However, the employer generally will introduce contrary evidence and the fact-finder must arrive at his decision "on consideration of the whole record" and "in accordance" with the evidence, APA Section 7(c).

In some cases the claimant's evidence will be found more persuasive and a decision will result in favor of the claimant. In other cases, the employer's evidence will be found clearly more persuasive in which case a decision will issue in favor of the employer. The principle of true doubt has nothing whatever to do with the Administrative fact-finding process to this point. It is equally important to emphasize that to this point there is no difference whatever on the burdens of either the claimant or the employer.

It is only when the ALJ, having carefully weighed all of the evidence, is doubtful about the ultimate factual determination that the principle of true doubt comes into play. The respondent has some difficulty with using the concept of the evidence being "in equipoise". It may perhaps be in the very nature of doubt that at some point and in some ways the ALJ will find the claimant's evidence more persuasive and at other times and indifferent ways the employer's evidence more persuasive. He may be uncertain as to the weight of the respective evidence or maybe uncertain as to the manner in which intangibles such as credibility or the financial interest of witnesses should be applied to the weight of the evidence.

In the case of such doubt, the principle of true doubt permits the ALJ to find in favor of the injured employee and his or her family, based upon a strongly expressed legislative intent and social policy. Under the Director's formulation, in that still more rare case where the administrative law judge finds the evidence to be precisely in equipoise, then a decision is mandated in favor of the claimant. The true doubt rule, as a general proposition, permits but does not require a finding in favor of the injured employee and his or her family. In other words, no reviewing body can force the administrative law judge

to utilize the principle of doubt to change the outcome of a case, where he or she has found that the evidence justifies a finding in favor of the employer, *Sprague v. SEC*, cited above; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993). Utilization of the principle lies within the sound discretion of the fact-finder and is not subject to judicial review. The same reasoning would apply, even where a determination would be issued against the claimant and such decision were against the manifest weight of the evidence. The limitations on judicial review exist even-handedly in behalf of the claimant and the employer.

The reviewing judicial body can do no more than require that the Administrative Decision be rational, supported by substantial evidence, and in accordance with law, *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, cited above. As to the standard of fact-finding, this is no more than declarative of both 7(c)'s and 10(e) of the APA. If an administrative law judge in a Workers' Compensation case were unwise enough to state that he is finding for the claimant even though he does not believe the claimant's evidence or even though he finds the employer's evidence more persuasive and is doing so because the relevant Act should be liberally construed in favor of the claimant (unlikely as such a statement is) then that decision could not withstand judicial review because it would be both irrational and not supported by substantial evidence (the latter because evidence was not the basis of the decision). By the same token, judicial review would overturn a decision wherein an Administrative Law Judge said he or she was finding a given way, not because of the appreciation of the evidence, but

because the ultimate factual determination was supported, not by what is believed to be the proper inference, but by more than a scintilla of evidence, i.e. substantial evidence.

Boiled down to essentials, it is the duty of an administrative law judge in proceedings under the respective Acts to make a decision based upon his or her conscientious appreciation of what is the appropriate finding. Such determination must be based solely upon the evidence of record and the fact-finder must believe the evidence in favor of his or her finding is at least as probable as the opposing evidence. The principle of true doubt, broadly stated, does no more than permit the administrative law judge, in a close case, to take into account the liberal policies of the respective Acts. It is indeed a most humble expression of such a strong judicial and legislative policy stated over so many years. There is little question that both of the decisions herein would not have gone either to the Third Circuit or this court if the ALJ had simply been silent aboout his or her doubt about the decision and simply stated conclusions. Is it rational to invalidate the decision because of expressed doubt about the ultimate finding? It is suggested not.

It is at least intimated by both employers-respondents that the involved programs are of extreme liberality and expense (*Greenwich* Brief, page 15; *Maher* Brief, pages 29-30) and further that the claimant and employer are in an equal financial position to produce evidence (*Greenwich* Brief, note 10, page 15).

There is no question that workers' compensation benefits can be a substantial expense to the employer but these payments do not approach what the employer would have to pay had employees retained their right of common-law or admiralty suits againsts the employer nor does it restore to

the employees what they would have earned but for the injury or death. The real argument of the employers herein truly is with the liberal interpretation of the respective Acts. They seek to reimpose upon the injured employee and his family the obligations of a common-law plaintiff without the corresponding opportunity to realize substantial damages.

It is, perhaps, not for this Court to determine whether or not the practice of ajudication of cases is slanted for or against the injured employee. Congress and the agencies respectively are, in a better position to do such investigations.

However, the following figures may be of some relevence. The Benefits Review Board Service "Longshore Reporter" (Matthew Bender), reports selected decisions of Administrative Law Judges as to the LHWC and extensions, but NCT the BLBA. Volume 24 through 27 cover a period from approximately June, 1990 to December, 1993. Review of those decisions in which there were presented an issue between the claimant and the employer reveals that the following percentages of claims were denied in their entirety (as opposed to being granted in whole or in part): Volume 24: 35%, Volume 25: 53%, Volume 26: 55%, and Volume 27: 47%. The limitations of statistics are readily accepted and it is not claimed that these figures are necessarily typical of all claims. However, these figures do demonstrate fairly convincingly that the Longshore program, at least, is not one of runaway liberality or the equivalent of a major medical insurance program.

The inescapable fact is that there is a great economic inbalance between the injured employee and his family as against an employer or insurance carrier. As these cases so vividly illustrates employers have the financial resources to utilize the services of well qualified specialists, who may or

may not be professional witnesses and obtain a great quantity of evidence. In both of these cases, the claimants relied on the testimony of their own attending physician. These attending physicians may not be of qualifications and background equal to the physicians produced by the employers because the claimants even before they became disabled, may not have been in a social-economic class to utilize such physicians. Assuredly, with enough money, the injured employee can obtain a consultation with a very well qualified physician, can (in a BLBA case) obtain any number of x-rays and pulmonary function tests equal to the number produced by the employer. However, in a typical case the employee is disabled and does not have the funds to do so. Perhaps it is suggested, then, that the claimant's attorney should pay the expense for, if the claimant prevails in contested case then the attorney can recoup these expenses from the employer, 928(a). However, the attorney in a longshore case must confront the ethical constraints against financing litigation. The Canons of Professional Responsibility permit advancement of such costs only when the client remains ultimately responsible for them, DR 5-103, quoted McKinney's Consolidated Laws of New York, Judiciary Law. Factually, the claimant's representative is often required to make do with whatever medical evidence the injured employee has accumulated in the course of treatment.

Administrative law judges in cases under the Longshore Act and the BLBA, who deal with such cases on a day-to-day basis understand the realities of the situation involving, because of the economic imbalance between the injured employee and the employer and the resulting desparity in the ability to produce evidence, that it is the true doubt rule that creates a level "playing field" between the employer and employee. On a practical level, the principle of true doubt,

especially in a context of a conflicting medical testimony, is badly needed by the injured employee and his family.

CONCLUSION

The decisions of the United States Court of Appeals for the Third Circuit in both cases should be reversed and the decisions of the Benefits Review Board in both cases reinstated.

Respectfully submitted,

PHILIP J. ROONEY
ISRAEL, ADLER, RONCA &
GUCCIARDO

Dated: February, 1994

FILE COPY

No. 93-744

Supreme Court, U.S.
FILED
DEC 21 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT GREENWICH COLLIERIES IN OPPOSITION

JOHN J. BAGNATO
Counsel of Record
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, Pennsylvania 15907
(814) 536-0735

MARK E. SOLOMONS
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400K
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-7100

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), authorize the U.S. Department of Labor's administrative law judges ("ALJ") to find facts in favor of certain classes of parties, based solely upon the identity of the party, even if the fact is not, in the ALJ's opinion, supported by the weight of the evidence, *i.e.*, a preponderance, but the evidence pro and con is roughly equal?

2. If section 7(c) of the Administrative Procedure Act compels an ALJ to find only facts that are supported by the weight of the evidence, has Congress expressly superseded the requirements of section 7(c) in the Black Lung Benefits Act and the Longshore and Harbor-workers' Compensation Act, in compliance with the rule against supersedure contained in section 12 of the Administrative Procedure Act, 5 U.S.C. § 559?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Andrew Ondecko ("Ondecko") is a claimant for benefits under the Black Lung Benefits Act. Petitioner below and now Respondent, Greenwich Collieries, is a wholly owned subsidiary of the Pennsylvania Mines Corporation. The Petitioner, Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the Black Lung Program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.1 STATEMENT... ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT 9

I. THE CIRCUITS AND THE AGENCY DISAGREE 9

II. THE THIRD CIRCUIT'S DECISION IN *MAHER* IS CORRECT 13

III. THIS IS AN IMPORTANT CASE 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Director, Office of Workers' Compensation Programs, 886 F.2d 818 (6th Cir. 1989) 4

Addington v. Texas, 441 U.S. 418 (1979) 8

Ardestani v. INS, 112 S. Ct. 515 (1991) 11

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1991) 17

Brownell v. We Shun, 352 U.S. 180 (1956) 19

Campbell v. Director, Office of Workers' Compensation Programs, 846 F.2d 502 (8th Cir. 1988) 4

Compton v. Inland Steel Co., 933 F.2d 477 (7th Cir. 1991) 3

Del Vecchio v. Bowers, 296 U.S. 280 (1935) 16, 17

Director, Office of Workers' Compensation Programs v. Alabama By-Products Co., 560 F.2d 710 (5th Cir. 1977) 11

Director, Office of Workers' Compensation Programs v. Peabody Coal Company, 554 F.2d 310 (7th Cir. 1977) 11

Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992) 17

Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993) 4, 9, 10, 12, 14

Grizzle v. Pickands Mather & Co., 994 F.2d 1093 (4th Cir. 1993) 9

Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs, 997 F.2d 1277 (3d Cir. 1993) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Marcello v. Bonds, 349 U.S. 302 (1958) 19

Morrison-Knudtsen Constr. Co. v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983) 17

Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987) 2, 3, 9, 10, 14

NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804 (4th Cir. 1975) 18

NLRB v. Transportation Management Corp., 462 U.S. 383 (1983) 10, 11, 12, 19, 20

Pennsylvania R. Co. v. Chamberlain, 288 U.S. 33 (1933) 18

Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983) 17

Professional Reactor Operator Society v. U.S. Nuclear Regulatory Commission, 939 F.2d 1047 (D.C. Cir. 1991) 11, 19

Provance v. United States Steel Corp., 1 Black Lung Rep. (MB) 1-483 (Ben. Rev. Bd. 1978) 16

Robinson v. Pickands Mather & Co., 914 F.2d 35 (4th Cir. 1990) 3

Santosky v. Kramer, 455 U.S. 745 (1982) 8

Skukan v. Consolidation Coal Co., 993 F.2d 1228 (6th Cir. 1993) 9, 10, 12

Southern Pac. Co. v. Sheppard, 112 F.2d 147 (5th Cir. 1940) 16

Southern S.S. Co. v. Norton, 101 F.2d 825 (3d Cir. 1939) 16

TABLE OF AUTHORITIES – Continued

Page

Steadman v. SEC, 450 U.S. 91 (1981) ..... *passim*

Trent Coal Co. v. Day, 739 F.2d 116 (3d Cir. 1984) 11

U.S. Industries v. Director, Office of Workers' Compensation Programs, 455 U.S. 608 (1976) 16

U.S. Pipe & Foundry Co. v. Webb, 595 F.2d 264 (5th Cir. 1979) 11

STATUTES AND REGULATIONS:

Administrative Procedure Act, as amended, 5 U.S.C. §§ 551-559, 701-706 (1988) 1

Section 4(b), 5 U.S.C. § 551(10)(E) (1988) 18

Section 7(c), 5 U.S.C. § 556(d) (1988) 2

Section 12, 5 U.S.C. § 559 (1988) 8, 13, 19, 21

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988) 2

Section 422(a), 30 U.S.C. § 932(a) (1988) 6

Section 422(k), 30 U.S.C. § 932(k) (1988) ii

Longshore Act, as amended, 33 U.S.C. §§ 901-952 (1988) 6

Section 19(d), 33 U.S.C. § 919(d) (1988) 7, 18

Section 20(a), 33 U.S.C. § 920(a) (1988) 16

38 U.S.C. § 5107(b) (1988) 13

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, as amended 2

TABLE OF AUTHORITIES – Continued

Page

Longshore and Harbor Workers' Compensation Act, Pub. L. No. 92-576, 86 Stat. 1261 (1972) 16

Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) 2

Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978) 2

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) 2

Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981) 2, 3

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 312, 313 (1986) 2

Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) 2

Black Lung Program Regulations
20 C.F.R. Part 718 (1993) 5

20 C.F.R. § 718.3 (1993) 13

20 C.F.R. § 718.403 (1993) 13

20 C.F.R. Part 727 (1993) 13

MISCELLANEOUS:

Sen. Comm. on the Judiciary, 79th Cong., 2d Sess., *Legislative History, Administrative Procedure Act* (1946) 7, 8, 19, 20

S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 14, 15

S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 14

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 248, 79th Cong., 2d Sess. (1946)..... 7

H.R. Rep. No. 1980, 79th Cong., 1st Sess. (1945)..... 18

92 Cong. Rec. 2148 (1946)..... 8

92 Cong. Rec. 2159 (1946)..... 8

Attorney General's Manual on the Administrative Procedure Act (1947) 19

3A Larson, *The Law of Workmen's Compensation* (1976) 16

Verkuil, *et al., Administrative Conference of the United States, The Federal Administrative Judiciary* (1992) 21

Brief for Federal Respondent, *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987) (No. 86-327) 3

No. 93-744

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT GREENWICH COLLIERIES IN OPPOSITION

Respondent Greenwich Collieries respectfully opposes the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit. Greenwich acknowledges, however, that disagreements among several courts of appeals over the meaning of key provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, governing on-the-record adjudications before dozens of federal boards and agencies warrant the attention of this Court.

STATEMENT OF THE CASE

A. In 1987, this Court held that a claimant for benefits under the Black Lung Benefits Act,[1] may utilize a very powerful presumption called the "interim presumption" if the claimant establishes a fact that invokes the presumption by a preponderance of the evidence. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 159 (1987). In petitioning the case to this Court, the Mullins Coal Company argued that the application of a preponderance standard is compelled by the plain language of the regulation, as well as by section 7(c) of the Administrative Procedure Act ("APA"). 5 U.S.C. § 556(d). The APA argument was based, in part, on this Court's decision in *Steadman v. SEC*, 450 U.S. 91 (1981). In *Mullins*, this Court agreed that the plain language of the regulation establishing the interim presumption embodied a traditional preponderance-of-the-evidence standard of proof, and did not, for this reason, reach the APA question. *Mullins Coal*, 484 U.S. at 161 n.35.

In briefing this question, the Department of Labor ("DOL") agreed that section 7(c) applied in black lung

[1] Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, and as further amended by the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981, 95 Stat. 1635, Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 312, 313 (1986), Omnibus Budget Reconciliation Act of 1987, 101 Stat. 1330 (1987) (hereinafter referred to as the "BLBA").

claims, but noted that it was applied "as modified by a 'true doubt' rule." Brief for the Federal Respondent at 34, *Mullins Coal*, 484 U.S. 135 (No. 86-327). Under the true doubt rule, "close calls go to the claimant." *Id.* at 33. This Court noted DOL's advocacy of a true doubt rule, but did not expressly approve or disapprove the rule. *Mullins Coal*, 484 U.S. at 144 n.12.[2] As dissenting Justice Marshall suggested, the rule was not frequently used. *See id.* 484 U.S. at 163 n.2 (Marshall J. dissenting). This was true while the interim presumption and other very generous statutory presumptions and rules of proof applied.

In 1980, DOL repealed the interim presumption for new claims, having been instructed to do so by Congress in 1978. In 1981, after concluding that the black lung program was excessively generous and had outstripped reasonable attempts at benefit funding as a result of over-inclusive benefit criteria, Congress repealed many of the Act's statutory presumptions and rules of proof designed to give claimants a special advantage in adjudications. Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635, §§ 201-04 (1981). *See Compton v. Inland Steel Co.*, 933 F.2d 477, 484-90 (7th Cir. 1991) (Coffey J. concurring). Under the new law, most claimants are required to prove their eligibility by competent evidence. *See e.g., Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990);

[2] It may be argued that the rule was expressly disapproved in the Court's adoption of a preponderance standard.

Adams v. Director, Office of Workers' Compensation Programs, 886 F.2d 818, 820 (6th Cir. 1989); *Campbell v. Director, Office of Workers' Compensation Programs*, 846 F.2d 502, 503 (8th Cir. 1988).

By the late 1980s, some ALJs often employed the true doubt rule to resolve evidentiary conflicts or merely to excuse themselves from conducting a careful review of the evidence. Use of the rule is not compelled by the Act, any regulation or judicial decision and ALJs treat it as an optional decisional device. The Department of Labor's Benefits Review Board, which conducts the appellate review of ALJs' decisions, has not held that an ALJ must employ the true doubt rule and generally allows ALJs to use the true doubt rule or the preponderance standard at the ALJs' election. Because the rule has no concrete source and its jurisprudence is ad hoc, the applicability of the rule in any case has always been unpredictable, depending more on the identity of the ALJ than on the characteristics of the proof in the record.

As the rule was applied more frequently following repeal of statutory proof enhancements, challenges to the validity of the rule increased. The rule is not the product of congressional deliberation or even the give and take of the regulatory process. For claim defendants, it seemed that the rule was employed solely for the purpose of rejecting otherwise persuasive, if not compelling, evidence. It is self-evident that a claimant who proves his or her case by evidence has no need for a true doubt rule. Judge Easterbrook is correct in observing that the rule's purpose seems to be to "re-create" the repealed presumptions and rules possibly "overriding the contrary judgment of Congress." *Freeman United Coal Mining Co. v.*

Office of Workers' Compensation Programs, 999 F.2d 291, 293 (7th Cir. 1993) (statement of Easterbrook J. respecting the suggestion for reh. en banc).

B. Andrew Ondecko filed a claim for black lung benefits on January 31, 1989. The claim was properly adjudicated under DOL's permanent eligibility rules adopted following repeal of the interim presumption. 20 C.F.R. Part 718 (1993). DOL administratively denied the claim and a hearing before an ALJ was requested. On August 3, 1990, ALJ Joan Huddy Rosenzweig awarded benefits. The ALJ found that Ondecko suffered from pneumoconiosis by applying true doubt to a factual record containing one qualified physician's opinion that Ondecko's x-rays showed pneumoconiosis and the opinions of eight qualified readers that the chest x-rays were negative for the disease. App. 41a. The ALJ also determined that Ondecko was totally disabled due to the disease by applying true doubt to a record containing a family doctor's opinion that Ondecko was so disabled and the opinions of four highly qualified specialists to the contrary. App. 44a. Greenwich appealed to the Benefits Review Board and there argued that the true doubt rule was inappropriately applied because the proof was not equal[3] and that the rule was, also, an unauthorized

---

[3] Greenwich continues in its belief that the evidence in this case is far from equal, and that the ALJ's finding to the contrary is not supported by substantial evidence or an accurate, reasoned review of the record. The true doubt rule is so offensive to claim defendants because it is most often used in this fashion and not to address irreconcilable evidence. Greenwich expressly preserves its right to further challenge the ALJ's weighing of the evidence.

supersedure of the APA-mandated preponderance-of-the-evidence standard. The Board affirmed, holding that the rule is valid and that the Board would not disturb the ALJ's weighing of the evidence. App. 20a, 21a.

The United States Court of Appeals for the Third Circuit reversed. App. 2a. The Court found that DOL's regulations assigning to claimants the burden of "proving" facts alleged, coupled with section 7(c) of the APA foreclose a result in which employers are assigned the burden of disproving entitlement facts in a black lung claim. In construing section 7(c), the Third Circuit relies on this Court's holding in *Steadman v. SEC*, 450 U.S. 91, interpreting the third sentence in section 7(c) to prohibit an ALJ from finding a fact unless the finding is supported by a preponderance of the reliable and probative evidence in the record. App. 12a-13a.

The Third Circuit observes that the true doubt rule impermissibly excuses the claimant from proving the facts needed to support an award. The award made by the ALJ was, therefore, vacated and the case was remanded for a determination of whether the evidence supporting an award preponderated. App. 16a. Rehearing was denied, en banc. App. 48a.

C. The Black Lung Act contains no procedures of its own for the adjudication of claims filed with DOL. For this purpose, the Black Lung Act incorporates by reference the adjudicatory provisions of the Longshore and Harborworkers' Compensation Act. 33 U.S.C. §§ 901-952 ("LHWCA"), *incorporated in parts by reference into* 30 U.S.C. § 932(a). The LHWCA provides: "Notwithstanding any other provisions of this chapter, any hearing held

under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5." 33 U.S.C. § 919(d).

On the same day that Ondecko's case was argued to the Third Circuit, the panel also heard argument in a Longshore claim filed on behalf of Michael Santoro. Here too, the ALJ resolved conflicts in the evidence by application of the true doubt rule, and the Third Circuit vacated and remanded for a review of the record under a preponderance standard. The Third Circuit's decision in Santoro's case differs from its decision in *Ondecko* in its complete reliance on section 7(c), and in particular on the third sentence of that paragraph. *Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs*, 997 F.2d 1277, 1282-85 (3d Cir. 1993). DOL also has asked this Court to review the decision in *Maher*.

Greenwich Collieries believes that the analysis in *Maher* is correct, and that the Third Circuit's partial reliance in *Ondecko* on DOL's regulations purporting to assign a burden of persuasion to claimants in the traditional way, is unnecessary. When the framers of the APA set out to adopt uniform standards for administrative adjudication, an important purpose was to control the way agencies evaluated proof and reached findings of fact. *See* Sen. Comm. on the Judiciary, *Legislative History, the Administrative Procedure Act*, 79th Cong., 2d Sess. 185, 208, 210, 321, 365 (1946) ("*Legislative History*"). Congress intended these features of administrative adjudication to parallel the traditional standards applied in the courts. *Steadman*, 450 U.S. at 101 (*quoting* S. Rep. No. 248, 79th Cong., 2d Sess. 365 (1946)). Congress did not leave room for agency corrections or deviations for any reason. "[I]t

will be the duty of the reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection. . . . " 92 Cong. Rec. 2148, 2159 (statement of Sen. McCarran). "Implied amendments [to the APA] shall be precluded." *Legislative History, supra* p. 7 at 43.[4] *See also Professional Reactor Operator Society v. U.S. Nuclear Regulatory Commission*, 939 F.2d 1047, 1052 (D.C. Cir. 1991).

The APA does not contemplate the allocation of burdens or standards of proof with an eye toward the identity of the party the proof favors. The third sentence of section 7(c) of the APA, in light of *Steadman*, most naturally means that ALJs may not find facts unless the facts are proven by a preponderance. This is the instruction to the factfinder that is embodied in section 7(c) "concerning the degree of confidence society thinks he should have in the correctness of factual conclusions. . . . " *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (*quoting Addington v. Texas*, 441 U.S. 418, 423 (1979)). No agency's regulatory gloss is necessary, and no agency's supersedure is appropriate.

The Third Circuit came to this conclusion in *Maher* and the court is correct in that holding.

---

[4] The tone of many of the comments of the framers and sponsors of the APA exhibit concern that full voluntary agency compliance with its provisions might not be readily forthcoming. The unusual rule against supersedure in section 12 underscores the concern. 5 U.S.C. § 559.

ARGUMENT

I. THE CIRCUITS AND THE AGENCY DISAGREE

There is no doubt that the circuits disagree. The Third Circuit here finds the true doubt rule to be incompatible with the APA, *Steadman* and *Mullins Coal*. On these authorities, the rule is invalidated. The Sixth Circuit and the Seventh Circuit find no such incompatibility and have approved the use of the rule. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993); *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993). The Fourth Circuit rejects the reasoning of the Seventh Circuit, but has deferred its consideration of the validity of the rule. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1098 n.7 (4th Cir. 1993).[5]

Even where the rule has been approved, there is little agreement on the reasoning that supports it. The only thing that has been consistent in DOL's defense of the rule is the inconsistency of the agency's arguments. Much of what is argued in the petition for certiorari is new or revisionist. Here, DOL argues variously that the APA does not apply, at least in the black lung claims, unless DOL wishes it, and then that it applies only to the degree

---

[5] DOL cites several cases arising in other circuits where an ALJ's use of a true doubt rule was approved. None of these cases involved a challenge to the validity of the rule, and they are not, therefore, in conflict with the Third Circuit's opinions here. No court of appeals has disagreed with the Third Circuit's invalidation of the rule in *Maher* in a case arising under the LHWCA. Prior applications of the rule in LHWCA cases have not been tested in the face of an APA challenge.

that DOL wishes. DOL's Petition for Writ of Certiorari at 24. But if the APA applies, then it does not allocate "burdens of persuasion" and the agency is free to do so consistent with the objectives of the LHWCA or BLBA. Those objectives, of course, contemplate favoring claimants, and if the agency elects to do so by embracing a true doubt rule, its judgment deserves deference. Finally, if the APA applies, and if it obligates factfinders to find facts only if they are supported by a preponderance of the evidence, then the remedial objectives of the BLBA and LHWCA supersede the APA. *Id.*

The Seventh Circuit held that the APA "unquestionably" applies in black lung adjudications. *Freeman United*, 988 F.2d at 710 n.6. This court, however, settled on the conclusion that the APA does not assign "burdens of persuasion" and that these burdens are assigned judicially. Taking the true doubt rule as its own, the Seventh Circuit adopts it, in light of certain legislative comments, as a matter of judicial preference. *Id.* 988 F.2d at 711. Support for the approach is drawn from a footnote in this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 383, 403 n.7 (1983), two snippets of legislative history and *Mullins Coal. Freeman United*, 988 F.2d at 711-12.

The Sixth Circuit agrees with the Seventh that "the true doubt rule is a judicial construct which sprang from" the remedial purpose of the BLBA. *Skukan*, 993 F.2d at 1236-7 n.8. The Sixth Circuit recognizes, however, that DOL's regulations assign the burden of persuasion to claimants on facts not legislatively presumed, but this court apparently does not believe that the job of assigning burdens is DOL's job. *Id.* 993 F.2d at 1238.

No court has agreed with DOL's belief that the courts must defer to DOL's interpretation of its regulations to extract the rule, and no court has agreed with DOL's view that, at least in black lung cases, it is bound by the APA at the agency's option only.[6] No court of appeals has agreed with DOL's unstated but apparent belief that deference should be accorded the agency's interpretation of the APA in light of the objectives of the BLBA and LHWCA. Deference is not appropriate on this account. *See Ardestani v. INS*, 112 S. Ct. 515, 526 (1991) (Blackmun J. dissenting); *Professional Reactor Operator Society*, 939 F.2d at 1051.

The only identifiable center of gravity for DOL, the Sixth Circuit and the Seventh Circuit has two simple components. The first is that the "burden of proof" footnote in *Transportation Management*, addressing the first sentence of section 7(c) of the APA, overrules or neutralizes the holding in *Steadman* addressing the third sentence in section 7(c).[7] The second is that the remedial

---

[6] DOL has argued from time to time, as it does here, that it is bound neither by the APA nor the procedural imperatives of the LHWCA. No court has agreed with DOL on these accounts, and indeed the plain language of section 19(d) of the LHWCA, 33 U.S.C. § 919(d), forbids DOL's interpretation, at least as to that provision. *See Director, Office of Workers' Compensation Programs v. Alabama By-Products Co.*, 560 F.2d 710, 718 (5th Cir. 1977); *Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310, 341-42 (7th Cir. 1977); *see also Trent Coal Co. v. Day*, 739 F.2d 116, 117 (3d Cir. 1984); *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 273 (5th Cir. 1979).

[7] This is quite plain. *Steadman* holds that the courts are not free, in an APA proceeding, to establish the standard for determining how much proof is needed to support a finding of fact

purpose of the BLBA allows the affirmation of a true doubt rule, because the rule favors claimants. The Third Circuit also acknowledged the remedial nature of the BLBA and LHWCA, but was unable to conclude that *Transportation Management* authorized a departure from *Steadman*, inasmuch as the two cases addressed different sentences in section 7(c) of the APA and different issues. *Maher*, 992 F.2d at 1282-83.

The on-the-record adjudication provisions of the APA apply in hundreds of different categories of proceedings conducted by many federal boards and agencies. Most of the statutes incorporating the APA carry a remedial or benevolent public purpose. The question that is presented here by DOL is whether the APA ought to give way when the agency finds it too constraining.

Two federal courts of appeals have effectively refused to follow this Court's decision in *Steadman*, and a federal agency has asked them not to do so. That surely merits this Court's attention. It is, perhaps, more important that the Department of Labor seeks to introduce a party identity based standard for evaluating proof in APA litigation, without congressional approval.[8] This is a

---

because "Congress has spoken." *Steadman*, 450 U.S. at 96. The Seventh Circuit thinks Congress was silent, thus authorizing a judicial assignment of the standard. *Freeman United*, 988 F.2d at 711. The Sixth Circuit agrees, citing *Freeman. Skukan*, 993 F.2d at 1236.

[8] Congress could, of course, adopt a true doubt rule for black lung and longshore claims. When procedures for the adjudication of publicly funded veterans benefits claims were revised and formalized in 1988, Congress expressly adopted a true doubt rule, codifying an informal but longstanding agency

dangerous and inappropriate path to take, and it is one that was anticipated and closed by the framers of the APA in their adoption of the rule against supersedure. 5 U.S.C. § 559. This Court should step in to enforce that rule.

II. THE THIRD CIRCUIT'S DECISION IN *MAHER* IS CORRECT

There is no language in either the BLBA or LHWCA suggesting a true doubt rule. DOL's LHWCA regulations are silent on the point as are the BLBA regulations in force for claims filed prior to the repeal of the statutorily mandated presumptions. *See* 20 C.F.R. Part 727. DOL's new BLBA regulations assign claimants the "burden of proving" their cases, 20 C.F.R. § 718.403, but elsewhere under a general heading state "Congress intended that claimants be given the benefit of all reasonable doubt." *Id.* § 718.3(c). No regulation articulates a "true doubt" rule as it is described by DOL.

The Social Security Administration ("SSA"), which adjudicated all black lung claims from 1970 to 1974, employed no true doubt rule, but required claimants to prove all facts not statutorily presumed, by a traditional

---

practice. 38 U.S.C. § 5107(b). DOL has not asked Congress to adopt a true doubt rule for either the BLBA or LHWCA. When the BLBA was substantially revised in 1982, to repeal most of the presumptions and rules of proof most helpful to claimants, DOL did not ask Congress to adopt a true doubt rule.

preponderance of the evidence. *Mullins Coal*, 484 U.S. at 154-55 n.27.[9]

There is no arguable source for the rule in the legislative history of the LHWCA, and DOL strains the relevant text in relying on the black lung legislative materials cited in support of the rule. DOL's Petition for Certiorari at 18-19 (*citing* S. Rep. No. 743, 92d Cong., 2d Sess. 11 (1972); S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977)). The 1972 Senate Report notes Congress's intent to resolve doubts in favor of claimants, but this comment prefaces the introduction of several new statutory presumptions and rules of proof enacted in 1972, for implementation by SSA. There was no DOL program at the time. In the next paragraph, the Committee stated: "The Committee bill gives the benefit of the doubt to claimants by [adopting the new statutory provisions]." S. Rep. No. 743, *supra*. Later in the same discussion, the Committee emphasizes that when the new statutory provisions do not apply, "[t]he Committee intends that the burden will be placed on the claimant to prove the existence of pneumoconiosis. . . . " *Id.* at 13. The 1972 passage, which is relied upon by the Sixth Circuit, the Seventh Circuit and DOL, is more naturally read to restrict SSA's authority to relax proof standards beyond what Congress wrote. SSA

[9] SSA applies no true doubt rule or its equivalent in disability insurance adjudications. Whether or not the APA applies in SSA's disability insurance programs, the decisions in *Skukan* and *Freeman United* suggest that a true doubt rule may be applied in SSA claims as a matter of judicial preference. The Social Security Act is no less remedial than the BLBA or LHWCA.

adopted no true doubt rule. The 1977 document, in context, is no more compelling. It simply recommends the promulgation of regulations containing more liberal criteria for objective testing. S. Rep. No. 209, *supra* p. 14 at 13. DOL overlooks the legislative materials accompanying the extensive 1981 amendments under which Ondecko's case was decided. These amendments reversed course in a program perceived by Congress to be out of control, by repealing virtually all of the liberalizing provisions referred to in the 1972 and 1977 materials.[10]

DOL also takes the Court on a curious trek in seeking to create a lineage for the true doubt rule dating back to the 1930s and the early days of the LHWCA. In arguing

[10] It bears mention also that much of DOL's discussion of the need for a true doubt rule is both misleading and disingenuous. DOL points out that black lung claimants are "sick and elderly individuals with limited resources," "who find it difficult . . . to prove that their diseases are totally disabling or coal mine related . . . ." DOL notes that clinical "tests" may be fallible "and that x-rays are imperfect means of ascertaining the existence of pneumoconiosis. . . . " *Id.* These rhetorical flourishes, if they were ever factual, have not been true for many years. Like any other federal program that transfers billions of dollars within a fairly restricted geographical area, the program has spawned its own related industries that serve the needs of claimants and employers alike. Few claimants with an arguable case will be abandoned by this system or will be unable to access it. Similarly, black lung is an exhaustively studied disease, and largely because of Congress's interest in it, x-ray and testing technologies are probably better than most. The case that is being presented to the Court here should not be influenced by the popular, but largely false, mythology often cited in black lung cases. Time has passed by these notions, and the 1981 amendments to the BLBA demonstrate congressional awareness of the current reality.

the case to the courts of appeals, DOL traced the rule to a 1978 Benefits Review Board decision in a black lung case. *Provance v. United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben. Rev. Bd. 1978). There is no articulation of a true doubt rule predating this decision, and none of the earlier LHWCA cases cited by DOL holds that employers must bear a "burden of persuasion" on all factual issues presented in a claim. For the most part, the earlier references to doubt resolving are judicial embellishments in cases where the adjudicator's findings are being sustained because they are supported by substantial evidence. *See e.g., Southern S.S. Co. v. Norton*, 101 F.2d 825, 827 (3d Cir. 1939); *Southern Pac. Co. v. Sheppard*, 112 F.2d 147, 148 (5th Cir. 1940).

The LHWCA cases cited for historical context focus generally on the presumption of occupational causation contained in section 20(a) of the LHWCA, 33 U.S.C. § 920(a), and virtually all of them predate the 1972 incorporation of the APA into the LHWCA. Pub. L. No. 92-576 § 14, 86 Stat. 1261 (1972). Section 20(a) of the LHWCA presumes that an injury or disease is occupationally related, but it shifts no ultimate burdens to employers. It is a bursting bubble rule that "falls out of the case" when contrary probative evidence is offered. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). This Court has previously rejected the theory that section 20(a) shifts ultimate burdens, and the opinion in the case fairly clearly precludes a section 20(a) based true doubt rule, as the rule is described by DOL. *U.S. Industries v. Director, Office of Workers' Compensation Programs*, 455 U.S. 608, 613-15 & n.7 (*quoting* 3A Larson, *The Law of Workmen's Compensation* § 78.10 at 15-2 (1976)).

It appears, in fact, that the ALJ in *Maher* layered a true doubt rule on top of section 20(a) because section 20(a) was not adequate to establish the claim. DOL defends this enhancement of the statutory rule, notwithstanding *Del Vecchio*, because of the independent viability of the true doubt rule. DOL's Petition for Writ of Certiorari at 10. This Court has often reminded the agency that the LHWCA may not be expanded beyond its terms on the pretext of boundless liberality. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *Morrison-Knudtsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 635-36 (1983); *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 282 & n.24 (1980).

No operational true doubt rule predates the Board's 1978 decision, and even after it was announced the rule was infrequently used in BLBA or LHWCA cases until fairly recently. DOL's attempt to provide a noble vintage for the rule is not accurate. For the most part, DOL's reasoning, and in particular, its deference claim are 1993 developments originating in this litigation. Were this a case in which the Court might be inclined to defer to the agency, and this should not be such a case, this Court would be deferring to a litigation-bred argument post-dating by thirteen years, the regulations being interpreted. DOL's deference claim is tenuous in this environment. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1991).

B. The solution to the questions presented here is not found in the remote sources and revisionist history presented by DOL, but in the plain language of the APA, its history and *Steadman*. Neither the BLBA nor the

LHWCA contains anything remotely resembling a true doubt rule. Both statutes, however, make the APA on-the-record adjudication provisions applicable "[n]otwithstanding any other provisions of this Act . . . . " 33 U.S.C. § 919(d). The APA prescribes standards of proof for the agency adjudications in which it applies. One of those standards is that ALJs needing to find facts may find them if they are supported by a congressionally determined "minimum quantity of the evidence." *Steadman*, 450 U.S. at 100. The minimum quantity of evidence that is acceptable to support a finding of fact in an APA proceeding is a preponderance. *Id.* at 100-104; *see also* H.R. Rep. No. 1980, 79th Cong., 1st Sess. 37 (1945). Where evidence is in conflict or "equally supports two inconsistent inferences," the evidence falls short of a preponderance and no fact is established. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 33, 39 (1933).

The third sentence of section 7(c) of the APA instructs the factfinder that "[a] sanction may not be imposed or rule or order issued" unless the APA proof standards are satisfied. Where evidence relating to a fact needed to support a rule, order or sanction[11] is no stronger or more persuasive than evidence to the contrary, no fact is proven and under the APA no fact may be found. *See e.g., NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 809 (4th Cir. 1975).

---

[11] The APA defines "sanction" to include "the whole or any part" of an agency's assessment of damages or compensation. 5 U.S.C. § 551(10)(E).

Section 12 of the APA provides, *inter alia*:

> Subsequent statutes may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly. . . .

5 U.S.C. § 559.

Supersedure is narrowly construed and it must be statutory. *Brownell v. We Shun*, 352 U.S. 180, 185 (1956); *Marcello v. Bonds*, 349 U.S. 302, 310 (1958); *Professional Reactor Operator Society*, 939 F.2d at 1052; *Attorney General's Manual on the Administrative Procedure Act* 75 (1947).

DOL has made no appropriate case for supersedure and seeks to escape section 12 mostly by reading any meaning out of the third sentence of section 7(c) and ignoring this Court's interpretation of it in *Steadman*. DOL's argument is that the ALJ does not look only at the proof when it is being weighed, but rather looks to see who the parties are before getting on with the job. Ambiguities in the proof are then resolved not based upon the strength and persuasion of the proof alone, but in the final analysis, on the identity of the party the proof favors. It seems quite clear that this is not what the authors and proponents of the APA had in mind. *See Legislative History, supra* p. 7 Foreward (1946).

DOL's discussion of shifting burdens, burdens of persuasion, and *Transportation Management* diverts attention from the central issues that are presented here. It is surely true that standards of proof and burdens of proof are related elements in the course of decisionmaking in APA matters as well as all other kinds of litigation. It is also true that the terminology and operation of these rules of

proof may become confusing, and if there has been anything consistent in DOL's arguments in support of the true doubt rule, it is in the agency's efforts to exploit this confusion.

The confusion is not, however, too difficult to dispel. The preponderance-of-the-evidence standard, as it is described in section 7(c) of the APA and *Steadman*, embodies a simple instruction. The instruction is that facts ultimately found must be supported by evidence that is at least slightly better than contrary evidence. DOL seeks to use the burden of proof language in the first sentence of section 7(c) to diminish the meaning intended in the third sentence. It may be that the APA does not assign ultimate burdens of persuasion, but the APA clearly does establish a fact finding standard. It does not do violence to any part of section 7(c) to effectuate the meaning of the third sentence and let the burdens fall where they may for all the parties to any proceeding. This reading harmonizes *Steadman* and *Transportation Management*, and accords with the intent of the APA's framers that section 7(c) operate as a whole. *Legislative History, supra* p. 7 at 216, 302.

> The first and second sentence of the section [7(c)], therefore mean that where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case, an agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance.

Id. at 270-71.

DOL argues for a reading that creates irreconcilable tension between the first and third sentences of section 7(c). DOL's reasoning is wrong on that account alone. The Third Circuit was correct in its reading of the relevant language.

III. THIS IS AN IMPORTANT CASE

DOL argues that the case is important because it may affect future BLBA and LHWCA claims, and indeed that is true. For the private litigants here, it is important for another reason. The comprehensive standards for administrative adjudication in the APA protect private litigants, not only in BLBA and LHWCA matters, but in many other matters of importance as well, from the attempts of agencies to re-design basic adjudicatory procedures indirectly to advance their policy objectives. The APA was designed to ensure a level playing field when litigants enter an ALJ's courtroom. 5 U.S.C. § 559. The APA maximizes the independence of the adjudicator and guarantees the fairness of the basic rules insulating both from the ebb and flow of agency policies and politics. Agencies have no great affection for the APA because it is a restraint. Researchers have attributed the phenomenal growth in the number of federal non-APA judges and relative stagnation in the growth in the size of the ALJ corps, at least in part, to agency dissatisfaction with the independence of APA adjudicators and the inviolability of APA rules. *See generally*, Verkuil, *et al.*, *Administrative Conference of the United States, The Federal Administrative Judiciary* (1992).

DOL may convince Congress to free it from the APA or expressly to enact a true doubt rule. Until that time, this Court should enforce the APA according to its terms.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted for the purpose of affirming the Third Circuit's holdings in these cases.

Respectfully submitted,

JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR,
WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, Pennsylvania 15907

MARK E. SOLOMONS
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400K
1801 K Street, N.W.
Washington, D.C. 20006

BEST AVAILABLE COPY

COUNTER STATEMENT OF QUESTION PRESENTED

In claims for benefits under the Longshore and Harbor Workers Compensation Act and the Black Lung Benefits Act, administrative law judges applied a rule of doubt concerning evidentiary conflict by virtue of which "any doubt" on "an" issue was resolved in the claimant's favor. This rule, when created and as employed thereafter, established a standard of proof applicable to the evidence of a longshore employee or his dependent family which is less than the preponderance; and, in fact, required the employers to abolish doubt of fact.

The question in these cases is whether either the "true doubt" rule now offered by the agency which, instead, shifts the burden of persuasion of fact by the preponderance to the employer, or the actual doubt rule applied in both cases subject to this petition, is both a permissible and reasonable agency determination to which deference is owed where statutes are silent. Petitioner claims, alternatively, that the "true doubt" rule is long established and sound law. Respondent claims that the Longshore Act is not silent and that any doubt rule violates it and the Administrative Procedure Act; and where applied to Longshore Act benefit claims it acts as a replacement for, and materially alters the effect of, that statute's presumption that "the claim comes within the provisions of this chapter"; and is unconstitutional.

TABLE OF CONTENTS

PAGE

COUNTER STATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS 1

STATEMENT 1

SUMMARY OF ARGUMENT 9

POINT I 10

THE LONGSHORE ACT DOUBT RULES 10

POINT II 19

DEFERENCE DOES NOT APPLY TO THE AGENCY'S DETERMINATION OF WHO IN A LONGSHORE ACT CASE BEARS THE BURDEN OF PERSUASION 19

POINT III 23

THE "TRUE DOUBT" RULE IS NOT AN INTERPRETATION OF THE LONGSHORE ACT WHICH IS NOT SILENT; AND FILLS IT NO GAP IN THE STATUTE WHICH IT VIOLATES IN THREE RESPECTS 23

A. The Agency's Rule Deletes Longshore Act Section 20 23

PAGE

B. The "True Doubt" Rule Contradicts the Fact Finder's Duty to Decide Upon Which The Longshore Act Review Procedure Depends . 27

C. The Scheme of the Longshore Act Establishes That Congress Intended That Its Fact Finding Function Not Be Biased 27

POINT IV 30

THE "TRUE DOUBT" RULE ACHIEVES WHICH SUPPOSEDLY COMES INTO PLAY AFTER THE LONGSHORE ACT PRESUMPTION HAS BEEN REBUTTED TREATS PRESUMPTIONS AS EVIDENCE 30

POINT V 32

BOTH THE "TRUE DOUBT" RULE AND THE ACTUAL LONGSHORE ACT DOUBT RULE OFFEND DUE PROCESS 32

POINT VI 37

THE COURT OF APPEALS WAS RIGHT TO REJECT THE "TRUE DOUBT" RULE AS CONTRARY TO THE ADMINISTRATIVE PROCEDURE ACT ... 37

POINT VII 42

THE "TRUE DOUBT" RULE IS IN ANY EVENT NOT A REASONABLE OR PRUDENT INTERPRETATION 42

CONCLUSION 48

TABLE OF AUTHORITIES

Cases:

PAGE

Adams Fruit v. Barrett, 484 U.S. 638 (1990) 19

Addington v. Texas, 441 U.S. 418 (1979) 40, 46

American Stevedore, Inc. v. Salzano, 538 F.2d 933 (2nd Cir. 1976) 16

Avignone Freres, Inc. v. Cardillo, 117 F.2d 385 (D.C. Cir. 1940) 10

Bath Iron Works Corp. v. White, 584 F.2d 569 (1st Cir. 1978) 14

Betz v. Arthur Snowden Co., 14 Ben.Rev.Bd.Serv. 805 (1981) 5, 17

Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74, 83 (1980) 44

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 4, 21

Bowers v. Hoage, 76 F.2d 996 (D.C. Cir. 1935) 12

Brown v. I.T.T./Continental Baking Co., 921 F.2d 289, (D.C. Cir. 1990) 14

Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980) 16

Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962) 15

Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469 at 477 (1947) 27

Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) 15, 28

PAGE

Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1983) 22, 27

County Court of Ulster County v. Allen, 442 U.S. 140 (1979) 32

Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923) 35

DelVecchio v. Bowers, 296 U.S. 280 (1935) 2, 7, 12, 14, 24, 25, 26, 31, 34

Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978) 16

Dick v. New York Life Ins. Co., 359 U.S. 437 (1954) .. 34

Director, OWCP v. Rassmussen, 440 U.S. 29 (1979) .. 44

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 43-44

Employer's Mutual Liability Ins. Co. v. Arrien, 244 F.Supp. 110 (D.C.N.Y. 1965) 25

Eschbach v. Contractors Pacific Naval Air Bases, 181 F.2d 860 (9th Cir. 1950) 15

Estate of Cowart v. Nicholas Drilling, 505 U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992) 21, 28, 45

Evans v. Compagnie Maritima Mexicana, 639 F.2d 848, 851 (2nd Cir. 1981) 34, 35

Fidelity & Casualty Co. v. Burris, 59 F.2d 1042 (D.C. Cir. 1932) 10

Flagstaff Medical Center, Inc. v. Sullivan, 962 F.2d 879 (9th Cir. 1972) 22

Friend v. Britton, 220 F.2d 820 (D.C. Cir. 1955) 11, 25

PAGE

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1943) 42

Gencarelle v. General Dynamics, 892 F.2d 173, 176 (2nd Cir. 1989) 35

Gooding v. Willard, 209 F.2d 913 (2nd Cir. 1954) 15

Grogan v. Garner, 498 U.S. 279 (1991) 41

Hensley v. Wash. Metro Area Transit Authority, 655 F.2d 264 (D.C. Cir. 1981) 14

Independent Stevedoring Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966) 10

Industrial Companies Institute v. Camp, 401 U.S. 617, (1971) 22

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) 44

Lampis Navigation, Ltd. v. Ortiz de Costes, 694 F.2d 934 (2nd Cir. 1982) 43

Maher Terminals, Inc. v. Director, OWCP, 992 F.2d 1277 (3rd Cir, 1993) 1

Maislin Industries, U.S. v. Primary Steel, Inc., 497 U.S. 116 (1990) 23

Marra Bros. Inc. v. Cardillo, 154 F.2d 357 (3d Cir. 1946) 26

Martin v. OSHRAC, 499 U.S. 144 (1991) 22

Matthews v. Eldridge, 424 U.S. 319 (1976) 41

Mobile, Jackson & K.C.R.R. Co. v. Turnipseed, 219 U.S. 35 (1910) 33

Morrison v. California, 291 U.S. 82 (1934) 34

PAGE

Morrison-Kundsen Const. Co. v. Director, OWCP, 461 U.S. 624 (1983) 26, 44

Mullins Coal Co., Inc. of Virginia v. Director, OWCP, 484 U.S. 135 (1987) 46

National Family Planning v. Sullivan, 979 F.2d 227, (D.C. Cir 1992) 3

Newport News v. Director, OWCP, 592 F.2d 762 (4th Cir. 1979) 16

NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292 (1939) 39

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) 22

NLRB v. Transportation Management, 462 U.S. 393 (1983) 3, 22, 32

NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) 19

Noble v. Drake Drilling Co., 795 F.2d 478 (5th ir. 1986) 13, 24-25

Norfolk and Western Railway Co. v. Liepelt, 444 U.S. 490 (1980) 44

Northeast Marine Terminals, Co., Inc. v. Caputo, 432 U.S. 249 (1977) 43

O'Keefe v. Smith, Hinchman & Grylls Assoc., 380 U.S. 359 (1965) 24

O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951) 13

O'Leary v. Puget Sound Bridge and Dry Dock, 349 F.2d 571 (9th Cir. 1965) 25

Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980) 13

PAGE

Pauley v. Bethenergy Mines, 501 U.S. ___, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) 20, 22

Perini Corp. v. Heyde, 306 F.Supp. 1321 (D.C.R.I. 1969) 16

Potomac Electric Power Co. v. Director, OWCP, 499 U.S. 268 (1980) 26

Powderly v. Schweiker, 709 F.2d 1092 (9th Cir 1983). 3

Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981) 26

Skidmore v. Swift, 323 U.S. 134 (1944) 4

Southern Pac. Co. v. Shippeard, 112 F.2d 147 (5th Cir. 1940) 11

Southern S.S. Co. v. Norton, 101 F.2d 825 (3d Cir. 1939) 11

Speiser v. Randall, 357 U.S. 513 (1958) 41

Sprague v. Director, OWCP, 688 F.2d 826 (1st Cir. 1982) 14

State Ins. Fund v. Pesce, 548 F.2d 1112 (2nd Cir. 1977) 45

Steadman v. SEC, 450 U.S. 91 (1981) 4, 17, 22, 27, 28, 33, 37, 39, 40, 41

Stevenson v. Linens of the Week, 688 F.2d 93 (D.C. Cir. 1982) 14

Strachan Shipping Company v. Shea, 406 F.2d 521, (5th Cir. 1969) 12

Swinton v. J. Frank Kelly, 544 F.2d 1075 (D.C. Cir. 1976) 25, 35

PAGE

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 31

Tot v. United States, 319 U.S. 463 (1943) 34

Travelers, Ins. Co. v. Donovan, 221 F.2d 886 (D.C. Cir. 1955) 25

Turner v. Transportacion Maritima Mexicana, 44 F.R.D. 412 (E.D. Pa. 1968) 14

U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982) 14, 21, 25, 32, 36

U.S. v. National Assn. Securities Dealers, 422 U.S. 694 (1975) 4

U.S. v. Nordic Village, 503 U.S. ___, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) 26

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 37-38, 39

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 34

Volpe v. Northeast Marine Terminals, supra, 671 F.2d 697 (2nd Cir. 1982) 15

Walter Tantzen, Inc. v. Shaughnessy, 601 F.2d 670 (2nd Cir. 1979) 6

Western & Atlantic R. Co. v. Henderson, 279 U.S. 639 (1929) 34

Wheatly v. Adler, 467 F.2d 307 (D.C. Cir. 1968) 14

Young & Co. v. Shea, 397 F.2d 185, reh.den. 404 F.2d 1059 (5th Cir. 1968) 12, 14, 15, 17, 27, 33

PAGE

Statutes and Regulations:

Administrative Procedure Act, 5 U.S.C. Section 551 *et seq* 1

5 U.S.C. 553 21

5 U.S.C. 554 19

5 U.S.C. 556(d) 1, 17, 32

5 U.S.C. 557(a) 1

5 U.S.C. 557(c) 1, 8, 17, 27, 32, 37

5 U.S.C. 559 42

5 U.S.C. 706 21

Black Lung Benefits Act, 30 U.S.C. Section 901 *et seq* 20

30 U.S.C. 901 20

30 U.S.C. 902f(1)(a) 20

30 U.S.C. 932(a) 4, 20

Federal Rules of Evidence Rules 1-700 33

Federal Rule of Evidence 301 ..... 7, 25, 31

Federal Rule of Evidence 401 29

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 *et seq* 1, 3

33 U.S.C. 902(2) 1, 9, 20, 21

33 U.S.C. 902(3) 43

33 U.S.C. 903(a) 1, 7, 12, 20, 21, 36

33 U.S.C. 905(b) 21, 45

PAGE

33 U.S.C. 906 44

33 U.SC. 908 ..... 44, 45

33 U.S.C. 909 44

33 U.S.C. 910 45

33 U.S.C. 919(d) 1, 14, 13, 20, 21

33 U.S.C. 920 ..... 1, 2, 7-9, 11-14, 16, 20, 24, 25, 26, 28, 29, 30, 32, 34-36

33 U.S.C. 921(b)(3) 1, 2, 9, 17, 20, 27, 28, 29

33 U.S.C. 921(c) 1, 2, 9, 17, 20, 27, 28, 29

33 U.S.C. 923(a) 20, 42

33 U.S.C. 933(g) 21

33 U.S.C. 941 20

33 U.S.C. 942 43

Rule 14 of the Uniform Rules of Evidence 31

20 C.F.R. 702.31 et. seq. 21

20 C.F.R. 725.452(a) 4

20 C.F.R. 718.403 38

Legislative:

H.R. 92-1441 (1972) 44

S.Rep.No. 743, 92d Cong., 2d Sess. (1972) 20

Proposed F.R. Evid. 301, 51 F.R.D. 315 (1971) 31

Other:

American Law Institute in Model Code Rule 704(2) .. 31

PAGE

Bureau of Labor Statistics; Workplace Injuries and Illnesses in 1992 35

Davis, *Administrative Law Treatise* (3rd Edition, 1994), Section 3.5, pp.119-120 23

Foreword to the Model Code of Evidence, A.L.I. Model Code of Evidence, 1942, pps.52-65 31

Larson, The Law of Workmen's Compensation, Section 41.00 at 7-353 35

McCormick, *Evidence*, Section 343 at p.968 (2d Ed. 1972) 24

Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv.L.Rev. 59 (1933) 31

Morgan, Some Observations Concerning Presumptions, 44 Harv.L.Rev. 906 (1931)..... 31

Notes of Advisory Committee on Proposed Rules..... 33

Sec. 18 A.L.I.Proc. p.226, 1941 31

Thayer, Preliminary Treatise on Evidence (1899) p.336 31

Weinstein's Evidence, Section 301[03], p.301-39 (1993) 31

Wigmore, *Evidence* 3d.Ed. 1940, Section 2491 31

Wright and Graham, *Federal Prac. and Procedure*, ...30, 31, 33

STATUTORY PROVISIONS

Sections 902(2), 903(a), 920 and 921(b)(3) and (c) of the Longshore and Harbor Workers Compensation Act and Section 577(a) and (c) of the Administrative Procedure Act are reprinted at App., infra, 1a.–4a.

STATEMENT

In *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 1284 (3 Cir, 1993), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. Section 901 *et seq*) case subject to the agency's Petition, the court of appeals held that Administration Procedure Act Section 7(c), 5 U.S.C. Section 556(d), establishes a standard of proof by the preponderance of evidence *and* allocates the burden of persuasion to the claimant seeking compensation benefits pursuant to Longshore Act Section 3(a) (33 U.S.C. Section 903(a)). As a result, it vacated an award of benefits after a Section 19(d) hearing which is governed by the Administrative Procedure Act, 5 U.S.C. Sections 500-559, based upon a determination by an administrative law judge that the issue upon which right to benefits depended was "still deemed to be debateable" (JA 55)[1]; and in order to find entitlement despite failure of proof by a preponderance of all of the evidence, the fact finder applied the rule " . . . that doubt concerning evidentiary conflict should be resolved in Claimant's favor . . ." (JA 50).

The Benefits Review Board affirmed the award, finding that the evidence had been determined to be "in equipoise" (JA 28) by the administrative law judge although he had not so concluded, and otherwise deciding, although the fact finder had not so held, that essential proof offered by the benefits claimant had been found to be credible. Upon appeal to the

[1] Citations preceded by "JA" are to the Joint Appendix.

Review Board and the court of appeals, respondent, Maher Terminals, argued that any rule applied in Longshore Act benefits claims permitting resolution of doubt in claimant's favor in the event of evidentiary conflict impermissibly treated the Act's Section 20(a) presumption "[t]hat the claim comes within the provisions of this chapter" as "evidence". It also argued that "substantial evidence" sufficient to rebut this presumption—proof as this Court held in *DelVecchio v. Bowers*, 296 U.S. 280 (1935) sufficient to justify a result contrary to what the statute presumes—was the same as "substantial evidence" justifying an award of benefits upon review pursuant to Longshore Act Section 21(b)(3) and (c), with the result that Congress could not have intended fact finding be biased in favor of the employee or his or her dependent family. In affirming, the Board held that the "evidentiary conflict" rule applicable to fact finding when the right to Longshore Act benefits is controverted requires the administrative law judge to decide "all doubtful issues of fact" (JA 28) or "any doubt [which] remains as to how an issue is to be resolved" (JA 29) in claimant's favor. It rejected respondent's argument "regarding the inapplicability of the true doubt rule" based upon *DelVecchio v. Bowers*, *supra*, holding that the rule "comes into play only once the presumption is rebutted and falls out of the case" (JA 29). The court of appeals also rejected all respondent/employer's arguments based upon the Longshore Act or any case interpreting it, holding that since the administrative law judge had properly found the Section 20(a) presumption invoked and rebutted it had not been a factor in his decision and for that reason need not be considered (JA 13). As a result, the court of appeals dealt with all issues raised by the parties on the basis of the Administrative Procedure Act, only.

Petitioner argues before this Court that although the Procedure Act establishes a preponderance of evidence standard (Pet. Brief p.17) it and the Longshore Act do not provide who as between the benefits claimant and the employer has the burden of persuasion of fact. The agency then claims that it

and the court of appeals have authority under this Court's holding in *NLRB v. Transportation Management*, 462 U.S., 383, 403 n.7 (1983) to change the customary burdens of persuasion since "permissible" to do so; and that this Court should defer to the agency's position. No effort to scrutinize what the Longshore Act provides, or to consider cases interpreting it, is made. Petitioner offers as an answer to an alleged gap in both statutes an agency "determination" (*Ibid.* p.15) which it does not acknowledge, since not the subject of regulation, has the effect of a legislative rule as it both supplements a statute (*National Family Planning v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir 1992)) and, as will be shown, effects a change in existing law or policy (*Powderly v. Schweiker*, 709 F.2d 1092, 1098 (9th Cir 1983)). The agency's answer does not, however, require "any" doubt on "an" issue be resolved in claimant's favor, it allocates the burden of persuasion to the employer on all issues necessary to an award of benefits and was offered for the first time in the court of appeals in the cases subject to its petition. The agency calls its statutory supplement the "true doubt" rule, which in error is said to be applied by the Department of Labor in adjudicating claims for benefits under both the Longshore and Harbor Worker's Compensation Act and Black Lung Benefits Act (30 U.S.C. Section 901 *et seq*). In a proceeding to enforce a claim for benefits under either, according to petitioner: ". . . in order to prevail, the claimant must . . . . adduce evidence that is both sufficient to justify a finding in his [or her] favor and—under the "true doubt" rule—at least equal in overall weight to the evidence adduced by the employer" (*Id.* at p.35-36, n.21). This description, because cast in terms only of what the employee need prove, disguises the rule's converse: The employer's proof is not enough unless of greater weight than the evidence offered by the employee, a fact made plain by the agency's assertion that it determines outcome ". . . in those few cases in which conscientious evaluation leaves the adjudicator unable to conclude that either side has produced a preponderance of the evidence on a particular point" (p.16).

The agency makes the argument that this Court should "defer" to what the agency has "determined" without disclosing how, when or why the determination was made, although ". . . the thoroughness evidence in [an agency's] consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements . . ." are factors which are to be considered in determining the appropriateness of deference. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

Consistent agency practice, in harmony with the statute and its legislative history, is considered persuasive authority regarding legislative intent (*Steadman v. SEC*, 450 U.S. 91, 103-104 (1981)); and a consistent and longstanding interpretation of an agency, while not controlling, is entitled to considerable weight. *U.S. v. National Assn. Securities Dealers*, 422 U.S. 694, 718 (1975). Deference is *not* owed to ". . . agency litigating positions that are wholly unsupported by regulations, rulings or administrative practices." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 226 (1988). The agency's argument for deference is as a result based upon claim that the "true doubt" rule, which requires that the evidence be first determined to be "otherwise in equipoise" ("Question Presented")—or a prior version or versions thereof not significantly different—was created by the courts of appeals and has long been sound law; which, if true, would mean that deference to its determination concerning the statute which it administers is not relevant. Petitioner then asserts that this Court must accept the agency's position if it can be shown not to "contravene" the Administrative Procedure Act, which is applicable to hearings of Longshore and Harbor Workers' Compensation Act benefits claims by virtue of 33 U.S.C. Section 919(d), Section 19(d), (Pub.L. 92-576 (1972)) and to the Black Lung Benefits Act claims by Longshore Act incorporation (30 U.S.C. Section 932(a)), as well as by regulation, 20 C.F.R. 725.452(a). The argument is not based upon any claim of deference since the Procedures Act is not a statute the agency administers; and if as petitioner

claims the Procedure Act does not contain an explicit rule of substantive law establishing who has the burden of persuasion, *no* allocation *can* contravene any specific provision of it.

The burden-shifting doubt rule dependent upon a preliminary finding of evidentiary "equipoise" now offered by the agency has never before been adopted in Longshore Act cases. This is established by the absence of any Benefits Review Board or court of appeals case insisting that the finder of fact determine that the supporting and opposing evidence on any issue essential to entitlement to benefits be so equally convincing as to make decision impossible before affirming an award where the doubt rule has been applied. Instead, it has been sufficient if the administrative law judge "analyz[ed] and evaluat[ed]" the conflicting evidence and, "conclud[ing] that some essential aspect of the case still remains doubtful", "he or she . . . identif[ied] that aspect of the case and appl[ied] the resolving doubts rule." *Betz v. Arthur Snowden Co.*, 14 Ben.Rev.Bd.Serv. 805 (1981). As explained by the Benefits Review Board and the agency, the "resolving doubts rule" or the "true doubt rule" (JA 29) differ from the " 'true doubt' rule" because the former is triggered by the mere existence of "any doubt" and the latter only by a determination of equal weight of evidence. For this reason the agency position represents an alteration of an existing rule, although both rules establish the employer's obligation to disprove fact.

The "true doubt" rule to which the agency would have this Court defer is an afterthought even in the two cases subject to this petition—neither was decided on the basis of the rule which it attempts to justify as a reasonable response to alleged legislative silence. In the claim against Maher Terminals the finder of fact never even weighed the evidence supporting and opposing the claim based upon alleged connection between the deceased employee's injury at work and later-occurring disability and ensuing death caused by cancer of the cervical spinal cord. Instead, respondent/employer's evidence that the deceased's astrocytoma had escalated in malignancy sponta-

neously, destroying the spinal cord "without reference to any external event" (Pet. Brief, p.9), was rejected by the administrative law judge as "inconsistent with the purposes and policies of the Longshore Act" (JA 55). In addition, he awarded benefits based upon doubt on an issue of causality of his own invention denied by both claimant and the employer and only thereafter determined the question to be "debateable" (JA 55), while characterizing the proof as "equally probative" for the first time in denying respondent's petition for reconsideration (JA 34). It was also never questioned other than by the ALJ whether the issue of causality was "incapable of scientific resolution". Instead, claimant asserted that disability and death for which benefits were sought resulted from "edema" caused by an accident at work, a factual question, although novel, of no great complexity and not different from similar issues resolved by referral to contemporaneous records and consideration of inherent plausibly both by the courts and administrative law judges routinely. Moreover, although claimant's edema " 'theory' " (JA 51) about which the fact finder expressed grave doubt and therefore indicated no difficulty evaluating can be said to have been probative, independent of its believability, since having "any tendency" to make the existence of a fact at issue more probable (F.R.Evid. 401), he made *no* finding that it was credible. The Benefits Review Board also impermissibly rewrote the fact finder's decision (see, e.g., *Walter Tantzen, Inc. v. Shaughnessy*, 601 F.2d 670,672, n.2 (2nd Cir. 1979)) by concluding that the administrative law judge's award had been "based on" (JA 28) the opinion of claimant's medical expert, although, instead, the fact finder had relied upon the existence of doubt; and, in addition, holding that: "All of the employer's arguments regarding the credibility of . . . [deceased's doctor's opinion] were considered below and rejected in turn" (JA 31). The Board so held despite the fact that the ALJ observed:

". . . there is some merit in the employer's position . . . that, in effect . . . [the employee's doctor's] . . . opinion is a gratuitous 'theory' to put the Claimant's case in the best light" (JA 51).

Although the "true doubt" rule was *not* applied, the agency nonetheless argues that the awards in both cases subject to its petition were entered in accordance with law; but for this reason it cannot in candor say that its rule is "sound in practice" (Pet. Brief p.23) Moreover, the rule which without question was applied is *invalid* as petitioner, because it offers a substitute, must be assumed to agree. The agency's "true doubt" rule presents a paradox arising from its claim of statutory silence upon which *every* aspect of its argument depends: The Longshore Act contains presumptions which assist the benefits claimant establish his or her case. As a result of the agency's burden-shifting doubt rule the claimant *needs no* assistance because it is supposedly reasonable to conclude that Congress intended *all facts* essential to an award of benefits be presumed until disproved *by stronger evidence*. This Court, in order to agree, must decide that Longshore Act Section 20 which contains presumptions which *do not* require stronger rebuttal evidence, is surplusage. In addition, there *is* a view that presumptions are created for reasons of policy and not just procedural convenience; and that any presumption *should* not only shift the burden of producing evidence but the burden of persuasion as well; and the "true doubt" rule is identically based upon policy and achieves precisely the same result as this view of presumptions long rejected in federal jurisprudence.

Whether the "true doubt" rule is identical to this view overruled by *DelVecchio v. Bowers, supra* and rejected by Congress in enacting F.R.Evid. 301 which, moreover, is fundamentally antagonistic not only to federal law but all American law, is not considered by the agency. It also does not acknowledge that even the cases applying the actual doubt rule are authority for the view that the Longshore Act imposes

the burden of persuasion generally upon the benefits claimant and not the employer. Petitioner, thus, avoids the more fundamental issues essential to its claim that its allocation *is* "permissible" simply by claiming that the statute is silent and then urging deference. It does so because in the case against Maher Terminals the court of appeals rejected argument that any doubt rule impermissibly treats the Section 20(a) presumption as evidence (JA 13), and abandoned any reliance on the Longshore Act or any case interpreting it by holding that Administrative Procedure Act Section 7(c) establishes who has the burden of persuasion as well as the standard of proof by the preponderance. This and the fact that the agency ignores the significance of the mere existence of Longshore Act Section 20 permits it to argue that because "neither the BLBA nor the LHWCA contains . . . a provision that allocates the burden of persuasion to the claimant, and that Section 7(c) does not impose such a requirement government-wide where the particular statute at issue does not do so" (Pet. Brief, pp.41-42, n.25); and that the "Question Presented" is only ". . . whether the 'true doubt' rule contravenes the Department's own regulations of Section 7(c) of the Administrative Procedure Act". For this Court to agree with the agency's position it must conclude that the Longshore Act and the Administrative Procedure Act are, in fact, silent; and that Congress intended in proceedings to enforce claims under the Longshore and Black Lung Acts that the agency, despite not having such adjudicative authority, can determine that all facts upon which the award of benefits depends should be presumed. Since a Longshore Act doubt rule materially different from the "true doubt" rule was actually employed, it must consider respondent's objection to this rule as well as the one the agency now proposes. If the "true doubt" rule is different from the rule which actually was applied, petitioner's argument is no more than that, guided by the Longshore Act's "humanitarian" purpose, it can impose any rule it chooses whatever its impact upon employers.

SUMMARY OF ARGUMENT

The court of appeals in holding that the doubt rule contravenes the Administrative Procedure Act, ruled correctly. The APA was enacted in order to prevent agencies from searching for evidence which could be said to be substantial and acting where proof did not preponderate, the same result that treating presumptions as evidence and any doubt rule achieves. Deference is not owed because there is no precondition of Longshore Act statutory silence. The Longshore and Harbor Workers' Compensation Act contains presumptions assisting the benefits claimant which are incorporated in the Black Lung Benefits Act. Thus, the Longshore Act, and by incorporation the Black Lung Act, are not silent on the question of who, as between the benefits claimant and the employer, bears the burden of persuasion of fact. Both Longshore Act Section 20 ("Presumptions") and 21 ("Review of Compensation Orders") refer to "substantial evidence" and the same standard of proof sufficiency applying in determining what evidence rebuts a presumption is applicable in deciding whether an award of benefits should be affirmed, which means that the Longshore Act was not intended to be biased in its fact finding function. A compensation order is non-reviewable if an award of benefits is based on doubt applied to resolve evidentiary conflict; and the agency's rule and the actual rule are, hence, irreconcilable with Longshore Act Section 921(b)(3) and (c). Both doubt rules impermissibly treat presumptions as evidence and cannot be applied in Longshore Act cases since there is no rational connection between their presumption of compensability and the fact of entitlement to benefits, claimed, as here, pursuant to Longshore Act Section 3(a) and 2(2), and for this reason they violate due process. No doubt rule is a sound interpretation of Congress' intent in amending the Longshore Act in 1972 to broaden its coverage and vastly increase benefits; which, if adopted by this Court, would have potentially crippling impact on Longshore Act employers.

POINT I

THE LONGSHORE ACT DOUBT RULES

According to the agency, its interpretation is a refinement (Pet. Brief, p.23) of a "longstanding" rule (*Ibid.*, pps.25,26) created in disputed benefits claims under the Longshore and Harbor Workers Compensation Act very soon after its enactment (March 14, 1927, Chapter 509, 44 Stat. 1424). Petitioner asserts that for "fifty years or more" administrators in finding facts and the courts in reviewing Longshore Act awards: "have applied *some variation of* the principle embodied in the 'true doubt' rule" (*Id.* at p.15, emphasis added)—that "doubtful questions incapable of scientific resolution are to be resolved in favor of the workman"—and that this ". . . principle, refined over time . . . has come to be known as the 'true doubt' rule" which ". . . has proven sound in practice and indeed has become an integral part of the administrative scheme" (p.23). The "principal", which is not limited to issues requiring "scientific resolution", *is* a view which certain of those interpreting and administering the Longshore Act over its long history have attempted to impose in a variety of ways of which the "true doubt" rule is only the latest.

Because the Longshore Act can be said to have "humanitarian" purpose, the courts, consistent with the statute's provisions, have structured rules regarding what need be proved in favor of the employee or his or her dependent family. For example, when an injury at work aggravates, accelerates or only combines with a pre-existing condition the entire resulting disability is compensable (*Independent Stevedoring Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)); and under the Longshore Act to hasten death is to cause it (*Avignone Freres, Inc. v. Cardillo*, 117 F.2d 385, 386 (D.C. Cir. 1940)). The early cases referring to resolving doubt in the benefits claimant's favor upon which petitioner relies: *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932); *Southern S.S. Co. v. Norton*, 101 F.2d 825 (3rd Cir. 1939); *Southern Pac. Co. v. Shippeard*, 112 F.2d 147 (5th Cir. 1940) played their role in the developing law of what a Longshore employee need prove, and had nothing at all to do with how facts were to be found. The first case to extend the rule's formulation as opposed to its application to doubts "including the factual" was *Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955), a case where a finding that an injury at work had caused disability but prolonged life—with the result that disability but not death benefits were owed—could not be upheld since not in accordance with law. It has, however, long been thought that the principle must also be applied to the separate question of how facts are to be found in a proceeding to enforce a claim for benefits; and this being so, it should be expected that the initial effort to so extend it would have been based on provision of statute, not its alleged "policy" or "purpose". When a presumption such as Longshore Act Section 20(a), which provides that it "shall be presumed in absence of substantial evidence to the contrary–[t]hat the claim comes within the provisions of the chapter" exists—if presumptions are "evidence", i.e., if they do not disappear upon presentation of proof sufficient to justify a contrary result but add weight after rebuttal supporting a finding of any fact presumed—the burden of persuasion, because in every case opposing evidence must be stronger, *is* transferred from the party in whose favor the presumption was created (the claimant who therefore must be assumed to originally have had it) to the disfavored party (the employer). Were this view correct, the principle of doubt resolution in the employee's favor would be realized; completely so in the event the evidence to overcome what the statute presumes is not enough even if of greater weight than that of the employee, but must "induce conviction".

The requirement that the employer in order to rebut a presumption "induce conviction" in the mind of the finder of fact was the original Longshore Act doubt rule. It was created in

Bowers v. Hoage, 76 F.2d 996 (D.C. Cir. 1935), a case involving the effect of the Act's Section 20(d) presumption against death by suicide which relied upon *Fidelity & Casualty Co. of New York v. Burris, supra*, the first Longshore Act decision to mention the concept of resolving doubt in the claimant's favor. If, however, presumptions are not evidence but "fall[] out of the case" when rebutted by substantial evidence which need only be "sufficient to justify" a contrary result and as a result only "control the result where there is an entire lack of competent evidence" as this Court in *DelVecchio v. Bowers*, 296 U.S. 280 (1935) held in reversing *Bowers v. Hoage*, it is possible, but not proper, to conclude that the principle can nonetheless be given effect by applying a lessened standard to proof introduced by the employee and a correspondingly higher one to that offered by the employer. Such a doubt rule applicable to Longshore Act benefit claims, based not upon any provision of statute but its "policy", was created in *Young & Co. v. Shea*, 397 F.2d 185, reh.den. 404 F.2d 1059 (5th Cir. 1968). It requires: ". . . all doubtful fact questions . . . be resolved in favor of the injured employee or his dependent family" and it is different from petitioner's "true doubt" rule because it does *not* allocate the burden of persuasion to the employer it lowers the standard by which claimant's evidence is to be judged below proof by the preponderance, as the court held in the case in which it was invented. See, *Young & Co. v. Shea, supra*, 397 F.2d at 185: "Under 33 U.S.C. Section 903(a) the claimant has the burden of proving all that is not presumed by virtue of Section 920"; and "[t]he standard of persuasion is less before the commissioner than before the court" (at 189). This rule of doubt assumes that such a lessened standard does not contravene the Administrative Procedures Act, just as petitioner's burden-shifting "true doubt" rule allegedly does not. This assumed, the actual doubt rule survived challenge in the next case to apply it, *Strachan Shipping Company v. Shea*, 406 F.2d 521, 522-523 (5th Cir. 1969), because that court rejected argument that ". . . the burden of proof for the petitioner in a compensation hearing is less stringent than in a civil suit" was contrary to the legislative history of the Administrative Procedure Act, which this Court had held in *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951) was applicable to Longshore Act benefit claim determinations although formal incorporation occurred only with enactment of Section 19(d) in 1972 (Pub.L. 92-576).

This actual rule also requires that the employer's proof induce conviction in the mind of the finder of fact; and depending upon whether a particular administrative law judge might choose as a matter of his or her discretion to apply it at all (Brief, Resp. Santoro, pps. 44-45), if extended to its limit can require the employer to prove that a Longshore Act employee is *not* entitled to benefits beyond a reasonable doubt, if not more. This rule is said *not* to treat presumption as evidence, because it applies only after the facts presumed by virtue of Longshore Act Section 20 are rebutted, and all doubts are resolved in favor of the employee only in the fact finder's ensuing consideration of all of the evidence pro and con. See, e.g., *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980). If the standard applicable to a Longshore Act employee's proof is less than the preponderance of evidence because he or she is given the benefit of *every* doubt, all that need to be established in order to prove entitlement is that it is *possible* that an injury occurred or conditions at work existed which *could have* caused the harm for which benefits are sought. Since under any workers' compensation statute harm is disability, if "injury" is "something gone wrong with the human frame", benefits are owed if only claimant offers evidence that such an occurrence might possibly have been work-related. See, e.g., *Noble v. Drake Drilling Co.*, 795 F.2d 478 (5th Cir. 1986). This analysis leaves the employer with the obligation to prove a negative—that neither injury nor working conditions played any part in bringing about whatever it was that led to disability—a burden which can *create* an issue "incapable of scientific reso-

lution", obviously. See, e.g., *Wheatly v. Adler*, 467 F.2d 307 (D.C. Cir. 1968). Under this interpretation Longshore Act benefits become disability and/or life insurance, as this Court recognized in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615, n.10 (1982).

In *Young & Co. v. Shea, supra*, the actual doubt rule was invoked to affirm an award in response to argument for collateral estoppel, and it would not seem that the fact finder had actually relied upon doubt in awarding benefits. The effect of this rule was to discourage appeals; and it was adopted at a time when the federal district courts to which appeals then were initially taken were overburdened by longshoremen's suits for damages. See *Turner v. Transportacion Maritima Mexicana*, 44 F.R.D. 412 (E.D. Pa. 1968). It is not required that the rule actually be applied. In *Sprague v. Director, OWCP*, 688 F.2d 826 (1st Cir. 1982), a case which respondent Santoro recognizes establishes that use of the *Young & Co. v. Shea* doubt rule is discretionary, the court of appeals affirmed denial of benefits in a case where the facts were said to be "close" and the doubt rule was not applied despite the court having adopted the actual Longshore Act rule in *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978); and the first Longshore Act case to mention the effect of evidentiary equipoise if found by an administrative law judge appears to be *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 (D.C. Cir. 1990). Efforts to rationalize the actual doubt rule are also confused. The approach when *Del Vecchio v. Bowers* is cited is, as mentioned, to hold the rule applicable only after the Section 20(a) presumption is rebutted. Where not, it has been said to be applicable in deciding whether a Longshore Act presumption *has been* rebutted. (See, e.g., *Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982); *Hensley v. Wash. Metro Area Transit Authority*, 655 F.2d 264, 267, 268 (D.C. Cir. 1981), an interpretation only better illustrating the impossibility of reconciling any doubt rule with this Court's *Del Vecchio v. Bowers* holding that presumptions are not evi-

dence and are rebutted by evidence sufficient to justify a contrary result. The Court of Appeals for the District of Columbia applies the *Young & Co. v. Shea* doubt rule although it contradicts its holding in *Charlton v. FTC*, 543 F.2d 903 (D.C. Cir. 1976): ". . . in American law a preponderance of the evidence is rock bottom at the fact finding level of civil litigation" and "nowhere in our jurisprudence can we discern acceptance of a standard of proof tolerating something less than the weight of the evidence" (at p.907). In *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1982), a case mentioning the doubt rule where denial of benefits was reversed, the court of appeals held that "all doubtful questions of fact [are to] be resolved in favor of the injured employee", and on this basis determined that "the administrative law judge did not require the burden of proof to be shifted to the employer". It so held without citing *Gooding v. Willard*, 209 F.2d 913,916 (2nd Cir 1954) in which the same court stated: "the burden to show that the accident was a contributing cause of death was on the . . . [claimant]". See also, *Eschbach v. Contractors Pacific Naval Air Bases*, 181 F.2d 860 (9th Cir. 1950) which held that in Longshore Act cases the claimant has the burden of proof. Moreover, *Young & Co. v. Shea, supra*, fails to mention *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693,695 (5th Cir. 1962) in which the same court had said "the burden of showing the accident caused an acceleration of death of the employee was on the claimant". No court has held as petitioner urges that the risk of non-persuasion on all issues of fact rests with the employer when the evidence is in equipoise, and the existence of cases, in which the doubt rule is, of course, not mentioned, reallocating the burden on a secondary issue further establishes how different the "true doubt" rule is compared with prior applications of the agency's principle.

As with every actual doubt rule case each Longshore Act decision treating any issue as an affirmative defense also contradicts petitioner's claim that the employer has long been

held to have the burden of persuasion on all issues of fact. In *Newport News v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979) it was said that once disability from Longshore Act employment is established, the "burden shifts to the employer, the proponent of a finding of *less* than total disability, to prove that alternative employment is available", since otherwise the employee "would have the burden of proving a negative fact—something that the law rarely, if ever, imposes". See also, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.C. R.I. 1969); *American Stevedore, Inc. v. Salzano*, 538 F.2d 933 (2nd Cir. 1976); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980), the last a case cited with approval by petitioner (Brief p.21) apparently because the agency does not realize its significance. In addition, every Longshore Act case deciding what questions of fact the Section 20(a) presumption extends, its effect, and how it is rebutted, demonstrates that the "true doubt" rule is not employed. See, *infra*, pp.24-25. That the "true doubt" rule is entirely new is, however, *conclusively* established by the fact that the Board and not the fact finder found the evidence to be "in equipoise"; and the former and not the latter determined the alleged credibility of respondent Santoro's "edema theory". Additionally, since the actual lowered standard of proof doubt rule and not the agency's novel burden-shifting variation of the principle, in fact, was applied, had the agency thought that a rule of doubt applicable to "evidentiary conflict" where "any doubt" on "an" issue exists was not proper, it would have sought remand to the administrative law judge in the court of appeals and would *not* have petitioned the Court in effort to have the award affirmed. In sum, the "true doubt" rule represents a litigation position if for no reason other than the agency, without so acknowledging, proposes that this Court defer to a determination creating a rule which was not actually employed.

It is the doubt rule created in *Young & Co. v. Shea, supra*, which was applied by the Benefits Review Board in Longshore Act proceedings in *Betz v. Arthur Snowden Co., supra*, a decision adding only requirement of explanation of fact finder doubt since otherwise benefits awards made on this basis would escape even semblance of review for purpose of determining whether "supported by substantial evidence" pursuant to Longshore Act Section 21(b) and (c). When explained, awards of benefits are affirmed since fact finder doubt is treated as though it were substantial evidence. The actual rule cannot, however, be law in the event—irrespective of who has the burden of persuasion generally or on a secondary issue—the party obliged must establish facts by the preponderance. Because in *Steadman v. SEC*, 450 U.S. 91 (1981), this Court, based upon legislative history, held that the Administrative Procedure Act imposes such a standard of proof, the agency concedes that the third sentence of Section 7(c) of the Procedure Act (5 U.S.C. Section 556(d)) ". . . requires . . . whichever party bears the burden of persuasion on an issue . . . generally (sic) establish it by the preponderance of the evidence. . ." (Pet. Brief, p.35). For this reason, petitioner, of necessity, abandons the actual doubt rule without admitting that it has done so and offers as a mere variation or refinement of an existing rule—although it is different in its standard of *dis*proof as well as mandatory and not discretionary in its application—a *third* means of imposing its alleged principle upon Longshore Act employers.

Since presumptions are not evidence assisting the party in whose favor they are established *and* the standard applicable to the party burdened is proof by the preponderance, the agency's "true doubt" rule reallocating the risk of nonpersuasion on all issues of fact is the only remaining way to skew the Longshore Act in its fact finding function so as to favor the employee at the expense of the employer. For the principle in its final version to be implemented in a

way best realizing the "humanitarian purposes and policies of the Longshore Act"—for doubts to continue as far as possible to be resolved in the employee's favor—the broadest imaginary zone for the fact finder to award benefits after declaring evidence favoring and opposing entitlement to be "in equipoise", "evenly balanced" or "equally probative" must be created. The "true doubt" rule's predicate—that the finder of fact no matter the extent of his or her conscientious scrutiny not be able to do better than decide that the evidence supporting entitlement to benefits is of exactly equal persuasiveness compared to that opposing it—is, however, but a restatement of the familiar rule that unless the evidence of party having the burden preponderates it loses. Moreover, because the "true doubt" rule is a principle of required use in all cases; and as petitioner concedes it, in fact, does reallocate the burden of persuasion (Brief, p.14), petitioner cannot, and does not, claim that it is applicable, as opposed to outcome-determinative, in "few cases" *Ibid.*, p. 16) or in "narrow circumstances" (*Id.*, p. 34). That this latest Longshore Act rule of doubt should be adopted is, however, a view *not* shared by respondent/claimant in the case against Maher Terminals, Inc. She claims ". . . some difficulty with using the concept of the evidence being 'in equipoise' "; and would retain the actual rule allowing the fact finder to award benefits based upon doubt as a discretionary exercise whenever the administrative law judge believes it indicated ". . . based upon strongly expressed legislative intent and social policy" (Brief of Resp. Santoro, p.44). Thus, that the "true doubt" rule is materially different is also demonstrated by the rejection of it by the party on whose behalf the agency intervenes.

POINT II

DEFERENCE DOES NOT APPLY TO THE AGENCY'S DETERMINATION OF WHO IN A LONGSHORE ACT CASE BEARS THE BURDEN OF PERSUASION

Petitioner asks deference to a determination of policy which the petitioner in error claims "the Department of Labor" applies "[i]n adjudicating claims for benefits under the Longshore and Harbor Workers' Compensation Act . . .", although the agency has had no power to adjudicate claims for Longshore Act benefits since 1972. In 1972, Congress, in amending Longshore Act Section 19 to formally incorporate the Administrative Procedure Act, provided: "Notwithstanding any other provisions of this chapter, any hearing . . . shall be conducted in accordance with the provisions of Section 554 of Rule 5" (19(d)). As petitioner states (Brief, p. 47, n.28), until 1972 the Department of Labor investigated, heard and decided controverted claims for Longshore Act benefits despite provision of 5 U.S.C. Section 554 requiring that an agency employee involved in investigation or prosecuting not participate in the determination. Although the agency also does not decide claims under the Black Lung Benefits Act, the deference issue is different applied to that statute compared to the Longshore Act. The fundamental justification of deference is that the agency determination is made based upon either expressly delegated authority or is a reasonable interpretation where the statute is silent is the administrator's "special competence". See, *NLRB v. Weingarten, Inc.*, 420 U.S. 251,266 (1975). This Court has found this special competence and Congressional delegation of administrative authority (*Adams Fruit v. Barrett*, 484 U.S. 638,649 (1990)) to exist in cases involving Black Lung Benefit Act claims because that statute has a ". . . complex and highly technical regulatory program . . ." which involves: "Identification and classification of medical eligibility criteria necessarily requiring significant expertise and entailing the exercise of judgment grounded in

policy considerations . . ." *Pauley v. Bethenergy Mines*, 501 U.S. ____, 111 S.Ct. 2524, 115 L.Ed.2d 604,624 (1991). The Black Lung Benefits Act was enacted in response to Congressional finding that ". . . . a significant number of coal miners living today . . . are totally disabled due to pneumoconiosis arising out of employment in the Nation's mines" (30 U.S.C. Section 901). It provides benefits for occupational disease as opposed to injury and although it incorporated certain provisions, including Sections 19, 20, 21 and 23, of the earlier enacted Longshore Act, Section 3(a) thereof and the Act's "injury" definition (Section 2(2)) at issue in the case against Maher Terminals were not included. See, 30 U.S.C. Section 932(a). Moreover, the Black Lung Act Section 902f(1)A specifically provides that the Department of Labor ". . . shall establish regulations which shall provide that a miner shall be considered totally disabled when pneumoconiosis presents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine . . . in which he or she previously engaged with some regularity over a substantial period of time . . ." Further, the legislative history of amendments to the Black Lung Act state ". . .[i]n the absence of definitive medical conclusion . . ." there is ". . . a clear need to resolve doubts in favor of the disabled miner or his survivors . . ." S.Rep.No. 743, 92d Cong., 2d Sess. (1972).

In the Longshore Act Congress delegated rule making authority to the agency with respect to "Procedure in Respect of Claims". In addition, Section 39 provides generally for administration by the Secretary of Labor and Section 41 contains a broad grant regarding "Safety Rules and Regulations". Unlike issues arising under the Black Lung Benefits Act, the Department of Labor has *no* expertise in determining what constitutes "disability [which] results from an injury" which Longshore Act Section 3(a) provides is a basis for an award of benefits; or what constitutes "injury arising out of and in the course of employment" (Section 2(2)), concepts explained

in *U.S. Industries/Federal Sheet Metals, Inc., supra*, without aid of any Department of Labor determination. An interpretation of a Longshore Act provision was offered to this Court by the agency is *Estate of Cowart v. Nicholas Drilling*, 505 U.S. ____, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992) in which the Act's Section 33(g) as bar to compensation after settlement by an employee or other person entitled to benefits of a negligence suit or claim ". . . against the vessel as a third party . . ." (Section 5(b)) was at issue, a question of appropriate interest to the Department of Labor since power to act was involved. There is, however, no reason to think that Congress intended that the agency, especially after adoption of Section 19(d) in 1972, have any more power to decide what proof of entitlement to Longshore Act benefits is or is not sufficient than it was given to interpret Section 5(b), and as a result establish a rule regarding what proof of negligence is adequate. The agency's recognition that it was given no authority to determine what quality or quantity of proof is necessary or who must offer it in deciding whether benefits are owed pursuant to Longshore Act Sections 3(a) and 2(2) is demonstrated by the fact and although the Department of Labor has established certain regulations regarding conduct of hearings (see 20 C.F.R. 702.31 *et. seq.*) it has never formally adopted the "true doubt" rule in "any proceeding for the enforcement of a claim for benefits" mentioned in Longshore Act Section 20. In fact, the agency must be deemed to know that it has no power pursuant to the rule making authority it was actually given to reallocate the burden of persuasion. The "true doubt" rule comes with the provisions of 5 U.S.C. 706 if of general applicability and future effect (see, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (concurring op., Scalia, J. at pp.216-217)) and no evidence exists that the agency ever before this case espoused a burden-shifting rule applicable only in cases of evidentiary "equipoise". Its adoption thus would require publication and opportunity for comment pursuant to 5 U.S.C. Section 553 since a new rule as

opposed to interpretive decision. See, *Flagstaff Medical Center, Inc. v. Sullivan*, 962 F.2d 879,886 (9th Cir. 1972).

Argument for deference is less compelling if inconsistent with previously held views. *Pauley v. Bethenergy Mines, supra*, 501 U.S. at ____, 111 S.Ct. 2524, 115 L.Ed.2d 604, 625 (1991). This should be especially so when alteration in the agency's position results from the fact that it cannot even attempt to justify the rule which was actually applied and this is not explained. Here, the explanation would have to include acknowledgement at least that the rule invoked in order to award benefits cannot be reconciled with *Steadman v. SEC, supra*, which the agency has demonstrated it has not misread; and the fact that petitioner's response is to substitute a new rule for the existing one establishes that the "true doubt" rule is by definition a litigation position to which the principle of deference is not applicable. *Martin v. OSHRAC*, 499 U.S. 144 (1991). Deference does not apply when the agency itself has articulated no position and, where owed, authority to make an interpretation elaborating and enforcing statutory commands must be found to have been delegated to an administrative official and cannot be exercised by appellate counsel. *Industrial Companies Institute v. Camp*, 401 U.S. 617, 628 (1971). In asserting that the Court has deferred to "similar determinations by agencies . . ." petitioner cites three cases, none of which are applicable to or supportive of its position: *NLRB v. Transportation Management*, 462 U.S. 393 (1983) and *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) in which the Court deferred to adjudicative positions of the NLRB and *Steadman v. SEC*, 450 U.S. 91 (1981) in which it held that legislative intent may be discerned from consistent interpretation of a statute by an agency but did not address the issue of deference. Whether the Court should defer to an adjudication by an agency with such power, unlike the Department of Labor, is a question subject to principles articulated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1983); and deference does not extend to "agency pronouncements in less formal formats, e.g., manuals, letters, guidelines, interpretive rules or litigating positions" since Congress does not delegate "to any agency the power to make policy decisions that bind courts and citizens . . ." in such a way. Davis, *Administrative Law Treatise* (3rd Edition, 1994), Section 3.5, pp.119-120. Even more fundamentally, the "true doubt" rule is not an interpretation of the Longshore Act and the agency's position does not supplement it on a question where the statute is silent; instead, it contradicts it.

POINT III

THE "TRUE DOUBT" RULE IS NOT AN INTERPRETATION OF THE LONGSHORE ACT WHICH IS NOT SILENT; AND IT FILLS NO GAP IN THE STATUTE WHICH IT VIOLATES IN THREE RESPECTS

A. The Agency's Rule Deletes Longshore Act Section 20

The principle of deference is inapplicable where the agency interpretation, even where established by regulation, is inconsistent with the statutory scheme considered as a whole. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Deference where express authority to implement Congressional commands is not delegated requires statutory silence on the question subject to agency determination and the interpretation for which deference is sought cannot be inconsistent with prior interpretations of this Court. In such a case the Court adheres to its interpretation under *stare decisis* and it judges the agency's later interpretation against its prior determination. *Ibid.* Where claim is made as here that the statute is silent, the agency's interpretation must appropriately fill a gap in the statutory scheme by articulating a view of the statute expressed by this Court or, at least, not inconsistent with an interpretation which the court has adopted. The agency *need not* claim deference and its resort to such argument cannot in this case be seen other than as a

confession that existing law does not support its interpretation. The invalidity of the "true doubt" rule is shown by the very existence of Longshore Act Section 20.

In enacting the Longshore Act, Congress provided in "proceedings to enforce claims for compensation" that "it shall be presumed, in the absence of substantial evidence to the contrary" that "the claim comes within the provisions of the chapter"; that "sufficient notice of . . . claim has been given"; that "the injury was not occasioned solely by the intoxication of the injured employee", and that ". . . injury was not occasioned by the wilful intention of the injured employee to injury or kill himself or another". Congress has not amended Section 20 to provide, for example, that the presumptions be rebutted only by more persuasive evidence, despite opportunity to do so over fifty-nine years since this Court's decision in *Del Vecchio v. Bowers, supra*. It is not reasonable to conclude that the Longshore Act presumptions say nothing at all about who generally has the burden of persuasion when entitlement to benefits is controverted; and this Court has held that the Section 20(a) presumption "exemplifies the humanitarian nature of the Longshore Act". *O'Keefe v. Smith, Hinchman & Grylls Assoc.*, 380 U.S. 359, 362-363 (1965). When a presumption is created it is intended that one party be preferred with respect to the fact presumed and his or her opponent, accordingly, disfavored. See, generally, McCormick, *Evidence*, Section 343 at p.968 (2d Ed. 1972). Too obvious to belabor were it not for petitioner's argument is that Section 20 assists the employee or his dependent family since its presumptions control the result and require an award of benefits in absence of any proof, as this Court held in *Del Vecchio v. Bowers*. No presumption, however, need exist if the "true doubt" rule is valid, since not enumerated facts but *all* necessary facts are as a result presumed. Because this is so, any case establishing what need be shown to invoke the presumption is mistaken or at least was decided unnecessarily. See, e.g., *Noble Drilling Co. v. Drake, supra* 795

F.2d at 481, a case holding that the fact of injury is not presumed but must be established, as the Benefits Review Board in the case against Maher Terminals also held (JA 40). In addition, consideration of the coverage of Section 20(a) (see, e.g., *Friend v. Britton, supra*, 220 F.2d at 824) is obviated by the agency's interpretation as a result of the "true doubt" rule, and for the same reason that all essential facts are presumed. Nonetheless, in *U.S. Industries/Federal Sheet Metal, Inc., supra*, 455 U.S. at 612, n.5, as petitioner paradoxically acknowledges (Brief, p.10-11, n.8), this Court observed that the "coverage of the Longshore Act Section 920(a) [20(a)] presumption is debatable" but that "[i]t seems fair to assume" that the Section 20(a) presumption "is of the same nature as the presumption created by Section 920(d) . . . as construed in *DelVecchio v. Bowers* . . . and the presumption defined in the Federal Rules of Evidence 301". An aspect of coverage of the Section 20(a) presumption is questioned because sometimes interpreted as limited to "adjudicative" as opposed to "jurisdictional" facts (see, *Employer's Mutual Liability Ins. Co. v. Arrien*, 244 F.Supp. 110 (D.C.N.Y. 1965). Section 20(a) has been applied to most Longshore Act benefit claim issues, including whether disability arises from an injury occurring during and in the course of employment and as a result that benefits are owed. See, e.g., *Swinton v. J. Frank Kelly*, 544 F.2d 1075 (D.C. Cir. 1976); *Travelers, Ins. Co. v. Donovan*, 221 F.2d 886 (D.C. Cir. 1955). It is not applied to the claim of injury. *O'Leary v. Puget Sound Bridge and Dry Dock*, 349 F.2d 571 (9th Cir. 1965)). But if there is to be a "true doubt" rule the "coverage" of this presumption in the sense of to what issues it applies is not "debateable" its very existence is a matter of no significance. In addition, in the claim against Maher Terminals the administrative law judge (JA 41) would have unnecessarily concluded that the employer in order to rebut the Section 20(a) had to offer evidence which was "substantial" and "specific and comprehensive enough to sever the potential connection between the resultant impairment and the work environment" (JA 41). In sum, the Longshore Act Sec-

tion 20 presumptions, which according to the agency impose ". . . a burden of production on the employer" (Pet. Brief, p.35, n.26), are entirely irrelevant if the "true doubt" rule is valid. The production burden, contrary to what the agency suggests, is *not* unimportant. See, *Marra Bros. v. Cardillo*, 154 F.2d 357, 359 (3d Cir. 1946), a case showing the effect of an employer's failure to "prove," i.e., produce, "substantial evidence," i.e., evidence "sufficient to justify" a contrary result and the presumption determined outcome where there was "an entire lack of competent evidence". More importantly, the agency's rule achieves a result which this Court has held Section 20(d) does not. The burden-shifting "true doubt" rule, unlike this presumption, is not overcome by evidence sufficient to justify a contrary result. For this reason, if the "true doubt" rule exists, *Del Vecchio v. Bowers*, is overruled.

It is a fundamental rule of construction of statutes that every word or phrase, to the extent possible, must be given effect (*United States v. Nordic Village*, 503 U.S. ____, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)); and it is never proper to treat, not a word or phrase, but an entire section of a statute, as redundant or as surplusage, and, hence, as meaningless. In effect, the "true doubt" rule replaces Section 20 with a substitute, one achieving the result the agency wishes Congress or this Court had provided. It is a reflection of the agency's dissatisfaction with this Court's *DelVecchio v. Bowers* holding that the Longshore Act Section 20(d) presumption is a procedural device, since it believes the Court failed in so holding to adequately further the statute's "humanitarian purpose". This is no more than the Benefits Review Board and agency's re-legislation to obtain a result more to their liking. *Morrison-Knudsen Const. Co., Inc. v. Director, OWCP*, *supra*, 461 at 635; *Potomac Electric Power Co. v. Director, OWCP*, 499 U.S. 268, 279, 282 (1980). In *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981) this Court held that especially in interpreting the Longshore Act the courts should adhere closely to which Congress has written. Here, the agency would have the court ignore what Congress has written and instead adopt whatever it says is, or should, be law. Where deference is claimed, this Court is, nonetheless, the better and final arbiter of what a statute means or Congress intended in enacting it. *Chevron U.S.A. v. Natural Res. Def. Council*, *supra*, 467, U.S. at 843, n.9 (1983).

B. The "True Doubt" Rule Contradicts the Fact Finder's Duty to Decide Upon Which The Longshore Act Review Procedure Depends

The Administrative Procedures Act Section 557(c)(3)(A) provides that all decisions include "findings and conclusions . . . on all material issues of fact, law or discretion". When resolution of "any doubt" on "an issue" in the claimant's favor is the basis of the award, the Benefits Review Board and the courts of appeals determine only whether the basis for doubt was properly explained; and in the event that the agency's substitute is adopted and the proofs are determined to be of equivalent weight, the Board and courts of appeals cannot determine whether this assessment was reasonable. Under the *Young & Co. v. Shea* doubt rule what is reviewed is not "evidence in the record considered as a whole" but the fact finder's subjective state of mind which cannot be substantial evidence. If the "true doubt" rule is adopted, review of a decision based upon evidentiary equipoise will not be possible since the Board and court are "not to weigh the evidence". See, *Steadman v. SEC*, *supra*, 450 U.S. at 100, n.20. Thus, both rules are inconsistent with Longshore Act Section 21(b)(3) and (c) because they dispense with the Procedure Act duty to decide as well of the obligation of a Longshore Act fact finder to "initially select [ ] the inference which seems the most reasonable", the "propriety" of which ". . . is vital to the validity of the order subsequently entered". *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 at 477 (1947).

C. The Scheme Of The Longshore Act Establishes That Congress Intended That Its Fact Finding Function Not Be Biased

Longshore Act Section 21(b)(3), which provided in 1972 for creation of the Benefits Review Board, states that "[t]he findings of fact in the decision under review shall be conclusive if supported by substantial evidence in the record as a whole". In *Estate of Cowart v. Nicklos Drilling Co., supra*, the Court restated the familiar principle of construction of statutes that ordinarily the same word or statute appearing twice must be given the same meaning. Giving "substantial evidence" the same meaning in both Longshore Act Sections 20 and 21 shows affirmatively that Congress intended the Longshore Act *not* be biased in favor of claimants in finding facts. Presumptions exist and are rebutted by substantial evidence which this Court has defined as evidence sufficient to justify a contrary result. This cannot be seen as a *higher* standard than that applied by the Benefits Review Board and the court of appeals when scrutinizing the record prior to affirming an award of benefits; and, in fact, it is the same standard. That the standard of agency fact-finding is the preponderance of the weight of the evidence does not mean that "substantial evidence" in Section 21(b)(3) and (c) is different from the standard applied in determining whether the Section 20 presumptions have been rebutted; despite the fact that under the former the Benefits Review Board or court deals with evidence *found by* an ALJ to have preponderated while in the latter the fact finder gives effect rebutting the presumption to evidence which he or she may subsequently decide not to believe. Of course, the Benefits Review Board and the court of appeals must affirm an ALJ's determination of fact although neither believes the evidence upon which the award or denial of benefits under review is based. In *Steadman v. SEC, supra*, 450 U.S. at 100, n.20 (emphasis added), the Court acknowledged and agreed with the holding of *Charlton v. FTC, supra* that the fact finder in an administrative proceeding must not misappropriate the standard of review by searching for evidence which might be deemed to be substantial, but must weigh all the evidence by the preponderance standard; and it also held that the ". . . *functions* of initial decision making and judicial review" are "different". The fact that most Procedure Act determinations of fact must be affirmed is not, correspondingly, license to an ALJ to decide fact in the way he or she would prefer; and because the standard of review is a mere search for the existence of substantial evidence, it is, for that reason, *essential* that fact finding be conducted free of influence of notions of statutory "purpose" or "policy" which Congress has not expressed.

It would appear that the doubt rule may have arisen from confusion of the different *functions* of the fact finder and the Board or court and the common *standard* applied by both, the former in determining whether rebuttal evidence is substantial and the latter in deciding whether to affirm or vacate. An administrative law judge in considering whether a Longshore Act presumption has been rebutted cannot weigh evidence any more that the Board or court can in reviewing the ultimate decision. He or she must, instead, judge only its probativeness and by the same standard that F.R. Evid. 401 provides. The court in a jury trial assesses an offer of proof only from the perspective whether it is "relevant" i.e., having "any tendency to make a fact in issue more probably or less probable", and not at all on the basis whether it should or should not be believed. So should an administrative law judge initially consider only whether the employer's evidence has any tendency to prove a presumed fact at issue and, if so, decide if it is also sufficiently comprehensive to justify a contrary result. If not probative at all, or if incomplete, he or she should award benefits. If both probative and complete, the ALJ should consider all of the evidence in light of credibility or other factors affecting weight pro and con; and then decide whether claimant's evidence preponderates. In short, if presumptions are not evidence but procedural devices, the administrative

law judge in deciding whether the fact presumed is rebutted and the Board and court in deciding whether an award of benefits should be affirmed—although their *functions* are different—use the *same standard*. As a result, "substantial evidence" has the same meaning in both Sections 20 and 21 only if there is *no* doubt rule. If this is so, the coverage of the Section 20(a) presumption might be treated as unlimited; and concern for excluding some facts for its scope, in any event, appears to have arisen from the view that the Longshore Act Section 20 presumptions are entitled to evidentiary weight. If Section 20(a) is a procedural device applicable to all issues of fact it is absurd to say that the "true doubt" rule, also applicable to all facts, "comes into play" once the statutory presumption is rebutted. Of course, the mere breadth of the language of Section 20(a) would suggest that Congress was aware that presumptions are not evidence. There is no gap in the statutory scheme for an agency interpretation to fill but only an alleged one created by the failure to recognize that Section 20 means that the agency has concluded in error that the Longshore Act does not specify who has the burden of persuasion.

POINT IV

THE "TRUE DOUBT" RULE WHICH SUPPOSEDLY COMES INTO PLAY AFTER THE LONGSHORE ACT PRESUMPTION HAS BEEN REBUTTED TREATS PRESUMPTIONS AS EVIDENCE

The "true doubt" rule improperly replaces the Act's presumptions with *an interpretation of them* rejected in federal law. For this reason the agency offers a supposed rule which is old wine in a new bottle. No matter how disguised, the "true doubt" rule achieves the same result as treating the Section 20(a) presumptions as applicable to all controverted questions of fact and adopting and extending the "California heresy" (see, Wright and Graham, *Federal Prac. and Procedure*, Vol. 21, Evidence, Section 5126, p.614) that "presumptions are evidence". This mistaken view of what presumptions do was referred to as ". . . this jurisprudential Lazarus" in Congressional hearings prior to enactment of the Federal Rules of Evidence. *Ibid*, Section 5121, p.545; Senate Hearings, p.58. In this interpretation: ". . . it seem[s] foolish for the court so create a presumption that would vanish upon the introduction of contrary evidence" because "presumptions . . . [are] . . . created for reasons of policy, not just procedural convenience". *Id*, Section 5122 at pps.564-565. See, Morgan, Some Observations Concerning Presumptions, 44 Harv.L.Rev. 906 (1931); Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv.L.Rev. 59 (1933). For this reason it has been believed that ". . . a presumption should have the effect of not only shifting the burden of producing evidence, but the burden of proof as well". Wright and Graham, *supra*, Section 5122, p.565.

This view is opposed by the so-called "Thayer-Wigmore" interpretation. See, Thayer, Preliminary Treatise on Evidence (1899) p.336; Wigmore, *Evidence* 3d.Ed. 1940, Section 2491. See, also, Foreword to the Model Code of Evidence, A.L.I. Model Code of Evidence, 1942, pps.52-65, where the contrast between these opposed versions of how presumptions should properly be treated is explained. There can be no question the "pure Thayerian view" of which *DelVecchio v. Bowers* ("ubi Thayer", 296 U.S. at 287, n.12) is an example (Weinstein's Evidence, Section 301[03], p.301-39 (1993)), has prevailed. Argument that presumptions should have any effect after rebuttal was rejected by Congress in enacting F.R.Evid. 301. See, Proposed F.R.Evid. 301, 51 F.R.D. 315, 336 (1971). It was also rejected by the American Law Institute in Model Code Rule 704(2). See, Sec.18 A.L.I.Proc. p.226, 1941. It was limited in Rule 14 of the Uniform Rules of Evidence, for reason of "what was thought to be constitutional objections to the Morgan approach when there

was no logical connection between the basic fact and the presumed fact". Wright and Graham, *supra*, Section 5122 at p.566. The Thayer-Wigmore interpretation was reaffirmed as the only permissible federal law treatment of presumption in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.10 (1981), a case, in addition to *DelVecchio v. Bowers* and F.R.Evid. 301, cited in *U.S. Industries/Federal Sheet Metal, Inc., supra*. In fact, the extreme view of what presumptions ought achieve—that presumptions should not just add weight assisting the party favored carry the burden of persuasion but should allocate the burden of persuasion to the party disfavored—has apparently never been adopted anywhere, a fact which in no way deters the agency from reoffering "this jurisprudential Lazarus" disguised by an argument for deference justified of course for the same reasons of policy.

POINT V

BOTH THE "TRUE DOUBT" RULE AND THE ACTUAL LONGSHORE ACT DOUBT RULE OFFEND DUE PROCESS IN LONGSHORE ACT CASES

This Court has held that "inferences and presumptions are a staple of our adversarial system of fact finding" and that "[t]he value of these evidentiary devices, and their validity under the Due Process clause vary from case to case . . . depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finder's freedom to assess the evidence independently". *County Court of Ulster County v. Allen*, 442 U.S. 140,156 (1979). As the petitioner states: "A legislature, in fashioning a particular program, may (within broad constitutional limits) impose whatever structure of proof it chooses for resolution of civil disputes arising under the statutory scheme" (Pet. Brief, p.19). As the agency also

claims, the courts or an administering agency where, as here, the authorizing statutes provide for adjudication of disputes pursuant to Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), may "change the customary burdens of persuasion" if it is "permissible" to do so. *NLRB v. Transportation Management Corp., supra.*

Whether the Longshore Act Section 20(a) presumption is a procedural tool or instead adds weight to proof offered by the party the presumption favors is crucial since if the latter its application is a potential violation of Due Process of Law. See, generally, Wright and Graham, *supra*, Section 5129. Petitioner refuses to attempt to justify the actual doubt rule not only because it cannot be reconciled with *Steadman v. SEC, supra*, but because it also knows, as the administrative law judge's award in the case against Maher Terminals demonstrates, that it is unconstitutional as well. There is no logical connection between disability and death from cancer of the cervical spinal cord and the presumed fact that such disability or death resulted from an injury arising out of and occurring in the course of employment. Respondent Santoro, more appropriately since the one employed urging this Court to adopt the actual doubt rule, claims, in unstated effort to deflect constitutional scrutiny from the *Young & Co. v. Shea* rule, that it is discretionary because if a rule of mandatory application it would be a "device [which] curtails the fact finder's freedom to assess the evidence independently" and hence would have no ". . . validity under the Due Process clause". In *Mobile, Jackson & K.C.R.R. Co. v. Turnipseed*, 219 U.S. 35, 42 (1910) this Court, in a case where the party burdened was required only to produce evidence following which ". . . the inference . . . [was] . . . at an end", held that for a presumption in a civil case to withstand the test of constitutionality ". . . there [must] be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbi-

trary mandate". In addition, the party against whom the inference is drawn must not be precluded from presenting his or her evidence to the contrary. See also, Notes of Advisory Committee on Proposed Rules, F.R.Evid. 301 reprinted in 28 United States Code Annotated, Federal Rules of Evidence Rules 1-700 at p.101 (West Publishing Co.). Maher Terminals, Inc. *was* precluded from having its evidence accepted since "contrary to the purposes and policy of the Longshore Act" and it could not have prevailed whatever the proof.

In *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), this Court upheld as constitutional a state statute containing a presumption against death by suicide which required that the party opposing establish that death resulted from accident. In *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639 (1929) it found a so-called "anti-railroad" presumption to violate due process because thought to an impermissible extent to treat presumptions as evidence. Concern for the constitutionality of presumption is, of course, more prominent in criminal cases. See, *Tot v. United States*, 319 U.S. 463 (1943). Presumptions requiring stronger evidence for rebuttal have been justified by "comparative convenience", i.e., because the party against the inference is drawn is better able to disprove the fact presumed than the party in whose favor it was created can prove it. *Morrison v. California*, 291 U.S. 82 (1934). In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) this Court applied the rational connection test to presumptions created as a matter of economic regulation. Products liability law presumes facts which might be said to be without logical connection, but has not been successfully challenged on due process grounds. A presumption of accident in a case of unexplained death is "natural" and *has* rational connection for reasons explained in *DelVecchio v. Bowers*; and so have all the Longshore Act presumptions save for the Section 20(a) presumption. Presumptions in the law of products liability operate to establish liability for a defect. In workmen's compensation the liability

issue is neither fault nor defect—the test of whether benefits are owed is only connection between disability or death and work. Employment covered by the Longshore Act, unlike coal mining, has never been shown to impose risk of a particular injury or illness. It is no longer anywhere near as dangerous as it was at the time of the 1972 Longshore Act amendments when it was the second most hazardous employment after coal mining (see, *Evans v. Compagnie Maritima Mexicana*, 639 F.2d 848, 851 (2nd Cir. 1981). Government statistics show that today longshoring is not among the forty (40) most dangerous occupations in terms of the number of reported injuries and illnesses in private industry workplaces. See, 1992 survey by *Workplace Injuries and Illnesses in 1992* by Bureau of Labor Statistics, United States Department of Labor dated December 15 993.

Arguably, longshoring involves potential greater risk that if an accident occurs it will result in fatality. In such event no Longshore Act employer would controvert liability if death is not totally the result of employee intoxication (Section 20(c)) or an act of suicide (Section 20(d)), where rational connection exists and, nonetheless, the presumption is a procedural device. In the application of Section 20(a) to claim of connection between employment and disability or death (see, *Swinton v. J. Frank Kelly, supra*) *no* rational connection, however, exists. In such cases if the party opposing a presumption—whether actual or invented, including any rule reallocating the burden of persuasion—is required to disprove the fact presumed the result is a violation of due process. It is the statute's language and any interpretive gloss which is considered in deciding the due process question. *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923). Such rules are unnecessary for the Longshore Act's true humanitarian purpose to be achieved. The Longshore Act, by its Section 2(2) "injury" definition, provides for benefits in the event of occupational disease; but for the employee to be found entitled to benefits he or she must

establish the existence of "any disease arising out of exposure to harmful conditions of the employment when those conditions are present in a peculiar or increased degree by comparison with employment generally". See, *Gencarelle v. General Dynamics*, 892 F.2d 173, 176 (2nd Cir. 1989) quoting Larson, *The Law of Workmen's Compensation*, Section 41.00 at 7-353. This, in addition to what is unmistakably injury caused by an accident imposed externally, is what ". . . . if the disability or death results from an injury" referred to in Section 3(a) means, not that injury is "something gone wrong with the human frame". In such a case claim for benefits for occupational disease and not injury should be made in a way properly avoiding, instead of ignoring, the Longshore Act requirement of proof of an actual injury. Claim of disability caused by heart attack or other vascular accident, or arthritis, which can be shown to the "employment bred", *should* require proof of unusual risk associated with the particular employment for compensation to be owed where disability results; and disability arising at work or after years of employment due to employee susceptibility should not be the employer's liability. It is the Act's provision for benefits in the event of occupational illness which achieves the statute's purpose, without treating benefits as disability or life insurance. See, *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, supra.* It also avoids misapplication of considerations such as "the humanitarian purposes and policies of the Longshore Act" producing unconstitutional results. The "true doubt" rule, if only arguably, is an improvement on the actual doubt rule considered from the due process perspective, another reason why it was created. In cases similar to those presented in the claim against Maher Terminals, where no rational connection whatsoever exists, it nonetheless violates due process. For this reason the sole permissible treatment of the Section 20(a) is as a procedural device which requires evidence production but does not affect the result after rebuttal. For the same reason of lack of rational connection, the burden of persuasion cannot be shifted in such a case from the claimant to the employer, since this, too, is a "purely arbitrary mandate".

POINT VI

THE COURT OF APPEALS WAS RIGHT TO REJECT THE "TRUE DOUBT" RULE AS CONTRARY TO THE ADMINISTRATIVE PROCEDURE ACT

The analysis of the court of appeals in the case against Maher Terminals provides the opportunity for petitioner's argument that the "true doubt" rule does not contravene the Administrative Procedure Act. Color, but not substance, is added to its claim that the court of appeals' decision is error by virtue of the fact that as the court itself acknowledged it is possible to read Procedure Act Section 7(c) and its legislative history together with *Steadman v. SEC*, as suggesting ". . . that the party who seeks a denial of relief is *also* required . . . to sustain such denial by a preponderance of the evidence". (JA 19). This is different as the court recognized from ". . . an interpretation of Section 7(c) that allocates the burden of persuasion *solely* to the party contesting the grant of relief". (JA 19). The agency does not insist upon the latter but upon the right to make the allocation in which event the court of appeals' concern for the impossibility of ". . . adversarial parties [having] to bear the same burden at the same time on the same issues or issue" (*Ibid.*) disappears. Petitioner's analysis of the Procedure Act assumes not only Longshore Act silence but also that the "true doubt" rule is either sound exsisting law or owed deference. Never before has an issue dependent upon two federal statutes been presented so independently of them; despite which the agency says the court of appeals misinterpreted the APA without citing

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) which explains why this statute was enacted.

Because the Administrative Procedure Act establishes the standard of proof, this fact, no less than the existence of Longshore Act Section 20(a) presumption, cannot be ignored in determining whether the Procedure Act also allocates the burden of persuasion. That there is no evidence the agency has heretofore believed the argument it now makes is demonstrated by the extent to which Black Lung Act regulation 20 C.F.R. 718.403 requires interpretation, whereby "burden of proving a fact" becomes a "burden of production", only (Pet. Brief p 30). Had the agency actually thought the Administrative Procedure Act no barrier to imposing the "true doubt" rule in Black Lung Act cases—because no allocation can contravene it and the authorizing statute incorporated provisions of the Longshore Act are allegedly silent—finding the "true doubt" rule in the regulations would not be at all difficult. As a result, the court of appeals could not have concluded that the "true doubt" rule was instead barred by the same regulations which the agency says establish it. Moreover, assuming the agency's view of statutory silence to be adopted in good faith, and that the Black Lung regulations contrary to any reasonable reading allocate, the agency must instead be assumed to have concluded—because otherwise no regulation would be needed—either that because the Administrative Procedure Act establishes the standard it imposes the burden upon claimant; or where the authorizing and administrative statutes are silent and their sound interpretation or proper implementation by regulation do not otherwise provide, that it was intended by Congress to be on the party seeking to change the status quo. Assertion that the court of appeals misread the agency's regulation *and* concluded in error that the Administrative Procedures Act supplied the allocation, in light of the agency's claim of silence, is inconsistent. The agency's rule's imaginary zone establishes that the "true doubt" rule is a violation of the Procedure Act and the burden-shifting position of the

agency contravenes, if not some specific APA provision, the reason it was enacted.

It is not possible to read *Steadman v. SEC* together with the Court's explanations in *Universal Camera Corp. v. NLRB*, *supra*, of why the APA was adopted as establishing, in a case of statutory and regulatory silence, other than that the party seeking to change the status quo was intended by Congress to have the burden of persuasion; but that it would be permissible to reallocate the risk of non-persuasion on secondary questions if appropriate, by making them a matter of affirmative defense. This is what the court of appeals correctly held and why its reasoning is sound. It is one thing to say that the Procedures Act does not *specify* which party to an administrative hearing has the burden of persuasion—the party seeking agency action or the one opposing it—and entirely another to conclude that Congress intended some "determination" affecting outcome in a civil proceeding involving money which requires agency action despite inadequate proof, and not the APA, would supply the answer. This Court has held the Procedure Act was adopted in order to prevent fact finders at administrative hearings from deciding that the agency should take action on the basis of insufficient proof. In this and other ways Congress intended the APA to improve the quality of administrative determinations by making decisional error less likely, concerns violated by the doubt rule in any version. In *Universal Camera Corp. v. NLRB*, *supra*, 340 U.S. at 478-479 (1950) the Court explained Congress' concern about what industry considered a "serious menace"—". . . the notion that it was enough that the evidence supporting the . . . result was 'substantial' when considered by itself"; or which ". . . when viewed in isolation substantiated the . . . [finding]." In *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939) before enactment of the Administrative Procedure Act, this Court defined substantial evidence as ". . . more than a scintilla"; and said that "[i]t must be enough to justify if the trial were to a jury, a refusal

to direct a verdict. . .” which “. . . must do more than create a suspicion of the fact to be established”. It is not difficult to believe that a fact finder—where the statute authorizing agency action can be said to have “humanitarian” purpose—might mistakenly conclude that he or she ought to search for evidence which would upon review be deemed to be substantial. It appears, however, that an award even prior to APA enactment based upon “suspicion”, and for this reason the result of doubt, was unlawful. It is also likely that because the civil jury trial standard of proof was included in the review standard before the APA was enacted, many agency finders of fact would have understood that since the jury is instructed to determine fact based upon which evidence preponderates he or she should apply this proof standard in his or her deliberations. But whether or not this is so and it *is* so if preponderance of weight of evidence is the “rock-bottom” standard, the APA was enacted to *prevent* agency determinations of the precise kind the “true doubt” rule, or any such rule, encourages. Search for any evidence which might be deemed substantial, presumptions as evidence and application of petitioner’s principle in any formulation *all* achieve the same result—they allow or, in the case of the “true doubt” rule *require*, the agency to act despite the proponent’s failure of proof. Because the Procedure Act was adopted to remedy misappropriation of the standard of review in finding facts, and it is settled that it establishes a standard of proof by the preponderance, this must mean, whenever the authorizing statute does not otherwise provide, that it allocates the burden of persuasion.

If evidence weighing requires a proof standard, the standard of proof must conversely be indication of who, in a proceeding governed by the Administrative Procedures Act where the authorizing statute is (only allegedly) silent, bears the risk of non-persuasion, as the court of appeals concluded. This Court has held that “. . . weighing evidence has relevance only if the evidence on each side is to be measured

against a standard of proof which allocates the risk of error”. *Steadman v. SEC*, *supra*, 450 U.S. at 99. In *Addington v. Texas*, 441 U.S. 418 at 423 (1979) it was said: “The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision”; and that it is the preponderance of the evidence standard which is applicable “in a monetary dispute between private parties . . . [s]ince society has a minimal concern with the outcome . . .”. As petitioner points out (Pet. Brief, p.36) this standard “results in a roughly equal allocation of the risk of error between litigants”. *Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Steadman*, *supra*, at p.99. The function of the legal process is, when appropriate, to minimize the risk of erroneous decisions. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958); *Steadman* at 425. The standard of proof which best minimizes this risk is whether a fact or any fact is more likely so than not so as a matter of preponderant evidence. The proof standards “beyond a reasonable doubt” or “clear and convincing” evidence, the former more than the latter, maximizes decisional error, but these examples of legal process function are justified by what is at stake. So does the “true doubt” rule, especially its imaginary zone, a fact apparent if only it is assumed that closer scrutiny and renewed careful analysis will lead more reliably to a decision reflecting objective fact. The actual doubt rule, of course, ignores the requirement that the legal process minimize error, since preferring avoidance of mistake in denying benefits even if this means that the administrative law judge does not actually decide any of the essential facts, what occurred in both cases subject to this petition. Both where the agency’s rule and when the actual rule is applied, the finder of fact is improperly allowed not to decide all of the essential issues of fact on the basis of weighing all of the evidence, a result which in enacting the APA Congress intended to prevent. In sum, the “true doubt” rule is entirely inconsistent with the APA statutory scheme. Since it establishes the burden and allegedly does not effect the standard of

proof it is obviously *designed* to, if possible, avoid the Procedure Act, 5 U.S.C. Section 559, bar to supesedure *no less than* to circumvent the presumptions as evidence objection to the actual doubt rule. It is also merely the sucessor to previous *false* doubt rules. In order: presumptions are evidence; the fact finder should be permitted to search for evidence which can be deemed to be substantial; and a lowered standard of proof ought be applied to the evidence of the proponent of agency action because of the authorizing statute's "humanitarian" purpose.

POINT VII

THE "TRUE DOUBT" RULE IS IN ANY EVENT NOT A REASONABLE OR PRUDENT INTERPRETATION

The agency makes argument for statutory authorization of its determination on the basis only of Longshore Act Section 23(a) which provides that claim adjudications "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure" and, therefore, has nothing at all to do with the issues raised by its petition. This argument establishes, however, yet another paradox resulting from the claim of need of agency "flexibility" (Pet. Brief p.23) in the "LHWCA administrative scheme" (*Ibid.*) although were the "true doubt" rule valid the employer would inflexibly bear the risk of non-persuasion on all questions. Its also claims that the Longshore Act ". . . is a remedial statute that should be construed liberally in favor of the employee or his [or her] dependents" and as a result claims for benefits should be met with "certain and immediate recovery" (Pet. Brief p.25), an argument which is circular. The agency's claim that the true doubt rule is not unfair to employers is based upon assertion that employer liability for compensation requires "liberality towards claimants" because the " 'quid pro quo for employers' immunity from potentially ruinous com-

mon-law tort suits' " (*Ibid* at p.26), an argument which establishes that the agency has no insight, much less expertise, concerning the cost of Longshore Act benefits to employers. Administrative efficiency is claimed because ". . . the hazardous nature of longshore work . . ." means the "true doubt" rule will ". . . increase[ ] the probability that a reported injury will in fact be work-related" (sic) (*Id.* at p.25), an argument too obscure to characterize. Agency assertion that the "true doubt" rule is justified as another of the ". . . special rules historically fashioned to protect maritime workers" fails to recognize the special rule of seamen's releases set out in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1943) has been held not to apply to Longshore Act employees who cannot be seamen by provision of Section 2(3). See, *Lampis Navigation, Ltd. v. Ortiz de Costes*, 694 F.2d 934, 936 (2nd Cir. 1982). Of these arguments, the one most illustrative of the importance of the agency's error is the claim that Longshore Act employers are protected by their obligation to pay benefits from far more expensive damage suits.

Longshore Act Section 42 requires that the secretary issue a report and these have included analysis of annual total cost to employers of Longshore Act benefits. Maximum benefits today are $738.30 *per week* and are tax free. Despite having this information, the agency has shown itself incapable of making a competent comparison of what compensation benefits are in relation to liability for damages. Correct analysis would establish, contrary to petitioner's argument, that in many, if not most, cases Longshore Act employers should prefer to be sued for damages rather than pay Longshore Act benefits. The expanded scope of the Longshore Act and the generosity of Longshore Act benefits as a result of the 1972 amendments *alone* demonstrate that Congress *could not* have intended that the employer be obliged to prove that benefits are not owed. The amendments extended Longshore Act coverage very significantly. See, *Northeast Marine Terminals, Co., Inc. v. Caputo*, 432 U.S. 249 (1977). *Edmonds v. Com-*

pagnie Generale Transatlantique, 443 U.S. 256 (1979) held that in amending the Longshore Act in 1972 "Congress made a determined effort to narrow the gap" between recoverable damages and benefits. *Morrison-Knudsen Const. Co. v. Director, OWCP, supra*, 461 U.S. at 636 held that the 1972 amendments were based on compromise and as a result were *not* remedial. In *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 83 (1980) this Court observed that prior to the 1972 amendments ". . . third-party actions had resulted in congested courts and the primary beneficiaries had been lawyers, not injured longshoremen", which suggests that not infrequently before the amendments when maximum benefits of $70.00 per week (H.R. 92-1441 (1972)) or less than 10% of what they are today, Longshore Act compensation was equivalent to damages net of attorneys' fees in cases usually tried to juries.

Tort recovery includes medical expenses and economic loss as well as damages for pain and suffering. A Longshore Act employer is liable for medical expenses, including "surgical and other attendance or treatment, nurse and hospital service, medical crutches and apparatus" pursuant to Section 7. In suit under federal statutes economic loss is calculated based on diminished income stream net of taxes. *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 493-494 (1980); and unreimbursed employee costs must also be deducted. See, *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534, n.10 (1983), a case in which this Court observed that in calculation of lost future wages the probability of employment as a matter of statistics at age 65 "drops to zero". Longshore Act Section 8(a) and (b) provides for payment of compensation equal to two-thirds of the injured employee's average weekly wage subject to cap provided by Section 6 in the amount of 200% of the national average weekly wage. Until Longshore Act Section 9 amendment in 1984 death benefits were not subject to the Section 6 maximum. *Director, OWCP v. Rassmussen*, 440 U.S. 29 (1979). Compensation payments to totally disabled employees or death benefits recipients

from 1972 to further Longshore Act amendment (Pub.L. 98-426, Section 10(b)) adding present Section 10(f)) were increased annually even if subject to Section 6 by the inflation rate. Now they are payable with annual increases of 5% or the rate of inflation, whichever is less. Where an injured employee's wage history shows that his or her pre-injury earnings were insubstantial, Section 10(c) requires that average weekly wage be calculated on the basis of an estimate which "shall reasonably represent the annual earning capacity of the injured employee". After 1972 employers were also liable as insurers of the life of any employee determined to be permanently totally disabled, since until 1984 benefits were owed to his or her dependents even where death was due to "unrelated causes". See, *State Ins. Fund v. Pesce*, 548 F.2d 1112 (2nd Cir. 1977). Benefits for total disability are payable "during the continuance of such total disability", which means that they are owed for life. Tort law provides that the person liable in a case of a pre-existing condition is liable only to the extent of aggravation. In compensation, benefits for total disability are, instead, owed if only injury combines with pre-existing factors to produce disability; and to hasten death to any extent is to cause it. The Section 8(f) so-called second injury fund offers employers no relief when injury causes total disability as a result of aggravation since created wholly by employer contributions. Neither fault nor comparative negligence exist in compensation, obviously.

These facts, all of which rebut the agency's "ruinous tort suit" argument for "true doubt" rule fairness, are reflected in *Estate of Cowart v. Nicholas Drilling Co., supra*, a case establishing that suit pursuant to Section 5(b) is both a hazard to a Longshore Act employee and a potential benefit to his or her employer even when the third party case settlement is completely funded by it although immune from suit. Analysis of whether suits for damages are the more ruinous, in fact, depends to a significant extent upon the employee's age and whether the circumstances of injury imply contributory

fault. When the gap between age at the time of accident and 65 is less than the period from age 65 until end of statistical life expectancy; or when injury occurs for reason of at all significant employee fault, the employer's liability for compensation is typically greater, especially since older employees tend to suffer conditions subject to being aggravated which would have worsened with time had no injury occurred. There is no question at all that liability for benefits will be significantly increased if the "true doubt" rule is found to apply and, as of course it will be, is combined with the Longshore Act aggravation rule. The "virtue" of the actual doubt rule is that it need not be applied; its vice, correspondingly, is that it is not law. As of decision in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 159, n.34 (1987) the agency was unable to demonstrate that any doubt rule had ever been applied in a Black Lung Benefits Act case. Now the agency asks for deference to a rule which must be applied in *all cases* and as a result every Longshore Act employer is at grave risk of increased compensation liability beyond its resources to pay.

In *Addington v. Texas, supra*, the Court suggested that which standard of proof applies may not always make a difference, but that the standard chosen acts as a signal indicating the extent of society's concern for the outcome. It should not be assumed that reallocation of the burden of persuasion would have only limited impact because determining outcome in only "few cases" as the agency claims. Were this Court to embrace the view that Congress intended that Longshore Act fact finding favor the employee, it would send a clear and powerful signal to administrative law judges how controverted claims preferably should be decided. The agency's lack of candor regarding use of the "true doubt" rule in the cases subject to its petition and its failure to disclose the bases for objection to it and the actual rule is awkward in light of this fact. And it is hard to understand how the secretary could adopt a "determination" so potentially antago-

nistic to the future of Longshore Act employment. Petitioner, of course, does not identify by whom the determination was made or its basis, and for this reason trivializes the concept of deference. The agency also does not explain how it actually can be that an ALJ cannot decide which version of fact he or she believes; or why finding that evidence is in equipoise, as a matter of policy, should be encouraged. As employed, the agency's rule may treat "equally probative" as the same thing as "in equipoise" although the former is not an assessment *necessarially* dependent on credibility, as the award in the case against Maher Terminals demonstrates. If so, the fact finder will still be permitted to search for evidence which, considered in isolation, provides only an alleged substantial evidence basis for agency action.

CONCLUSION

The court of appeals correctly determined that the Administrative Procedure Act bars use of the agency rule. This result is further justified by the provisions of the Longshore Act as well as the treatment of the effect of presumptions in federal law. The decisions in the cases against Maher Terminals and Greenwich Collieries should be affirmed.

Dated: New York, New York
March 30, 1994

Respectfully submitted,

JOSEPH T. STEARNS
Attorney for Respondent
Maher Terminals, Inc.
KENNY & STEARNS
26 Broadway
New York, New York 10004
(212) 422-6111

APPENDIX

APPENDIX

1. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 902. Definitions:

When used in this chapter–

* * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

2. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 903. Coverage:

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

* * *

3. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 919(d):

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5.

Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972 in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

4. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 920. Presumptions:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or anther.

5. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 921:

(b)(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceedings unless order by the Board. No stay shall be

issued unless irreparable injury would otherwise ensure to the employer or carrier.

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

4. Administrative Procedure Act, 5 U.S.C. Section 557, Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with Section 556 of this Title.

* * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

1. proposed findings and conclusions; or
2. exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
3. supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or except presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -

(A) findings and conclusions, and all the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

* * *

CERTIFICATE OF SERVICE

I, JOSEPH T. STEARNS, an attorney admitted *pro hac vice* before this Court, hereby certify that on March 30, 1994 I served true and accurate copies of the above Brief of Maher Terminals, Inc. via first class mail, postage prepaid, upon:

JOHN J. BAGNATO
Spence, Custer, Saylor, Wolfe & Rose
U.S. National Bank Building
P.O. Box 280
Johnstown, PA 15907
Attorney for Respondent Greenwich Collieries

MARK E. SOLOMONS
LAURA METCOFF KLAUS
Arter & Hadden
1801 K Street, N.W., Suite 400K
Washington, DC 20006
Attorneys for Respondent Greenwich Colliers

DREW S. DAVIS, III
Solicitor General
Department of Justice
Washington, DC 20530
Attorney for Petitioner

PHILIP J. ROONEY
Israel, Adler, Ronca & Gucciardo
160 Broadway
New York, New York 10038
Attorney for Respondent Pasqualina Santoro

Dated: New York, New York
April 1, 1994

/s/ Joseph T. Stearns

No. 93-744

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS J. WILLIAMSON, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

TABLE OF AUTHORITIES

Cases:	Page
Alameda County Training and Employment Bd. v. *Donovan*, 743 F.2d 1267 (9th Cir. 1984)	12
Bell v. *Wolfish*, 441 U.S. 520 (1979)	13
Betz v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805 (1981)	6
Capotorto v. *Compania Sud Americana de Vapores*, 541 F.2d 985 (2d Cir. 1976)	6
City of Seymour v. *Industrial Comm'n*, 131 N.W.2d 323 (Wis. 1964)	7
Concrete Pipe & Prods. of California, Inc. v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993)	7
Del Vecchio v. *Bowers*, 296 U.S. 280 (1935)	4, 5
Dundee Wollen Mills v. *Chism*, 219 S.W.2d 628 (Ark. 1949)	7
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979)	17
Environmental Defense Fund, Inc. v. *EPA*, 548 F.2d 998 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977)	12, 15, 17
FDIC v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986)	3
F.H. McGraw & Co. v. *Lowe*, 145 F.2d 886 (2d Cir. 1944)	2, 7
Freeman United Coal Mining Co. v. *OWCP*, 988 F.2d 706 (7th Cir. 1993), petition for cert. pending, No. 93-935	10
Friend v. *Britton*, 220 F.2d 820 (D.C. Cir.), cert. denied, 350 U.S. 836 (1955)	3
Garmeada Coal Co. v. *Mabe*, 222 S.W.2d 829 (Ky. 1949)	14
Greer v. *Director, OWCP*, 940 F.2d 88 (4th Cir. 1991)	10
Hawes v. *Georgia*, 258 U.S. 1 (1922)	14

Cases—Continued:

	Page
Heiner v. *Donnan*, 285 U.S. 312 (1932)	14
International Anthracite Corp. v. *Gilbert*, No. 92-3195 (3d Cir. May 14, 1993)	9
Kerner v. *Fleming*, 283 F.2d 916 (2d Cir. 1960)	14
Maine v. *United States Dep't of Labor*, 669 F.2d 827 (1st Cir. 1982)	12
Martin v. *OSHRC*, 499 U.S. 144 (1991)	3
Mattfield v. *Ward Baking Co.*, 221 N.Y.S.2d 224 (App. Div. 1961)	7
McKemie v. *McKemie*, 45 S.E.2d 456 (Ga. Ct. App. 1947)	14
Morrison-Knudsen Constr. Co. v. *Director, OWCP*, 461 U.S. 624 (1983)	3
Morewitz v. *Andros Compania Maritima, S.A.*, 614 F.2d 379 (4th Cir. 1980)	6
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987)	2-3, 17
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983)	10
Newport News Shipbldg. & Dry Dock Co. v. *Director, OWCP*, 592 F.2d 762 (4th Cir. 1979)	11
Noble Drilling Co. v. *Drake*, 795 F.2d 478 (5th Cir. 1986)	4
Northwestern Elec. Co. v. *Federal Power Comm'n*, 134 F.2d 740 (9th Cir. 1943), aff'd, 321 U.S. 119 (1944)	14
Old Ben Coal Co. v. *Battram*, 7 F.3d 1273 (7th Cir. 1993)	7
Old Ben Coal Corp. v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975)	16
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989)	13
Peabody Coal Co. v. *Director, OWCP*, 449 U.S. 268 (1980)	7, 9

Cases—Continued:

	Page
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 286 (1980)	3
Radio Corp. of America v. *Radio Eng'g Laboratories, Inc.*, 293 U.S. 1 (1934)	14
Riley v. *U.S. Industries/Federal Sheet Metal, Inc.*, 9 Ben. Rev. Bd. Serv. (MB) 936 (1979), rev'd, 627 F.2d 455 (D.C. Cir. 1980), 455 U.S. 608 (1982)	4
Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 (1946)	5
Skukan v. *Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), petition for cert. pending, No. 93-964	10
Sprague v. *Director, OWCP*, 688 F.2d 862 (1st Cir. 1982)	7
Stapleton v. *Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986), rev'd *sub nom. Mullins Coal Co.*, 484 U.S. 135 (1987)	17
Steadman v. *SEC*, 450 U.S. 91 (1981)	11
Trailmobile Co. v. *Whirls*, 331 U.S. 40 (1947)	16-17
U.S. Industries/Federal Sheet Metal, Inc. v. *Director, OWCP*, 455 U.S. 608 (1982)	3
Ward's Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989)	14
Wooten v. *Sibs A/S Samuel Bakke*, 431 F.2d 821 (4th Cir. 1969)	6
Young & Co. v. *Shea*, 397 F.2d 185, on petition for rehearing, 404 F.2d 1059 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969)	4

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
§ 5, 5 U.S.C. 554	18
§ 7(c), 5 U.S.C. 556(d)	10, 11, 12, 13, 14, 15, 16, 17, 18, 19
§ 12, 5 U.S.C. 559	17
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*:	
30 U.S.C. 921(c)	12

Statutes, regulations and rule—Continued:

	Page
30 U.S.C. 956	17-18
Federal Power Act § 301(a), 16 U.S.C. 825(a)	13
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:	
§ 2(3), 33 U.S.C. 902(3)	5
§ 5(b), 33 U.S.C. 905(b)	5
§ 6(b), 33 U.S.C. 906(b)	5
§ 8(a), 33 U.S.C. 908(a)	5
§ 8(i), 33 U.S.C. 908(i)	6
§ 15, 33 U.S.C. 915	6
§ 16, 33 U.S.C. 916	6
§ 19(d), 33 U.S.C. 919(d)	18
§ 20(a), 33 U.S.C. 920(a)	4, 12
§ 20(d), 33 U.S.C. 920(d)	4
§ 21(b), 33 U.S.C. 921(b)	3
§ 23(a), 33 U.S.C. 923(a)	19
§ 33, 33 U.S.C. 933	5
§ 39(a), 33 U.S.C. 939(a)	2
Mine Safety & Health Act of 1977, 30 U.S.C. 801 *et seq.*:	
30 U.S.C. 812(c)	18
30 U.S.C. 823(b)(2)	18
Cal. Code Evid. § 115 (West 1966)	19
9A *Uniform Laws Annotated*, Uniform Rule of Evidence 1(4) (1965)	19
20 C.F.R.:	
Section 701.202(a)	2
Section 718.3(c)	9, 18
Section 718.205(d)	8
Section 727.203	9, 12
29 C.F.R.:	
Pt. 1917	5
Pt. 1918	5

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947)	16
Bureau of Labor Statistics, U.S. Dep't of Labor, *Workplace Injuries and Illnesses in 1992* (1993)	6

Miscellaneous—Continued:

	Page
127 Cong. Rec. (1981):	
p. 31,747	8
p. 31,977	9
3 K. Davis, *Administrative Law Treatise* (2d ed. 1980)	14
Dep't of Labor, Coal Mine (BLBA) Procedure Manual (Feb. 1980)	8
Employment Standards Admin., U.S. Dep't of Labor, *Longshore and Harbor Workers' Compensation Act, Annual Report on Administration of the Act During Fiscal Year 1992* (1993)	5
48 Fed. Reg. 24,278 (1983)	8
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946)	16
1 A. Larson, *The Law of Workmen's Compensation* (1993)	7
McCormick on Evidence (E. Cleary 3d ed. 1984)	12
Pacific Maritime Ass'n Ann. Rep. (1993)	5
S. Doc. No. 248, 79th Cong., 2d Sess. (*Legislative History of the Administrative Procedure Act*) (1946)	16
S. Rep. No. 743, 92d Cong., 2d Sess. (1972)	7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-744

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The "true doubt" rule at issue in these cases provides that when evidence submitted by a claimant and the party opposing an award of benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) or the Black Lung Benefits Act (BLBA) is

of "equal weight," the remaining doubt is to be resolved in favor of the claimant. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 144 n.12 (1987); see also J.A. 9 (describing rule as applied below under LHWCA in *Maher*); Pet. App. 19a n.3 (describing rule as applied below under BLBA in *Greenwich Collieries*). We show in our opening brief that the "true doubt" rule is a longstanding principle of adjudication under both the LHWCA and the BLBA; that the rule is supported by the statutory and regulatory scheme under both programs; that the rule is also consistent with evidentiary principles in a variety of settings; and that it presents no conflict with Section 7(c) of the APA, 5 U.S.C. 556(d).

1. Respondents Maher Terminals (Br. 10-18) and Greenwich Collieries (Br. 37-40, 47-49) assert that the rule as we describe it is not a longstanding one, and that we inaccurately describe its operation.

a. The officials charged with administering the LHWCA have recognized since at least 1943 that "doubtful questions incapable of scientific resolution are to be resolved in favor of the workman." *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 887 n.1 (2d Cir. 1944) (quoting administrative decision).[1] This is

[1] In arguing that petitioner's use of the "true doubt" rule is entitled to no deference, Maher (Br. 19-20) and its amici (National Ass'n of Waterfront Employers, *et al.* (NAWE) Br. 17) fail to recognize that Congress has provided that the Secretary of Labor "shall administer" the LHWCA, and has given him express authority "to make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a); see 20 C.F.R. 701.202(a) (delegating that authority to petitioner). Thus, petitioner administers the LHWCA to the same extent that she administers the BLBA, see *Mullins Coal Co.*, 484 U.S. at 159, and in the same sense that the Secretary of Labor administers the Occupational Safety and Health Act, see *Martin* v. *OSHRC*, 499 U.S. 144 (1991). Petitioner's consistent, longstanding views are accordingly entitled to deference. Another part of the Department of Labor, the Benefits Review Board, is an adjudicatory body established by the 1972 amendments to the LHWCA to perform functions that district courts previously performed. See 33 U.S.C. 921(b); Gov't Br. 24. Although the Board is not a policymaking body, and thus is not entitled to deference on questions of statutory inter-pretation (see *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980)), petitioner and the Board agree on the proper scope and application of the "true doubt" rule. There is therefore no question that the rule represents the view of the Department and is entitled to deference. Compare *Martin* v. *OSHRC*, *supra*. Moreover, it is not necessary, as Maher contends (Br. 21), that the Director's views be set forth in a regulation. See *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (deferring to agency "practice and belief" that was not "reduced to a specific regulation"); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (longstanding agency practice under LHWCA is entitled to deference).

essentially the "true doubt" rule. It is one application of the more general principle, long recognized by courts, that "[d]oubts, *including the factual*, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton*, 220 F.2d 820, 821 (D.C. Cir.) (emphasis added), cert. denied, 350 U.S. 836 (1955).[2] The "true doubt" rule described in our

[2] Maher's amici go so far as to suggest (NAWE Br. 7) that the "true doubt" rule came into use in the 1980s as a "remedial alternative" to this Court's decision in *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608 (1982). The Benefit Review Board's decision in *U.S. Industries* itself, however, shows that the rule was well-established at that time, and "does not require that the administrative law judge always find for claimant when there is a dispute or conflict in the testimony." *Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*,

opening brief has been one of the principles governing LHWCA adjudications for many years; and it is that principle, not some possible broader formulation, that is at issue here.[3] See Pet. I (Question Presented); J.A. 9.

Maher also misunderstands the "true doubt" rule's application. As the court below correctly recognized (J.A. 13 & n.2), the rule does not result in a misuse of the presumption in Section 20(a) of the LHWCA, 33 U.S.C. 920(a), "[t]hat the claim comes within the provisions of this chapter." That presumption, like the Section 20(d) presumption construed in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935), places an initial burden of production on an employer, but "falls out of the case" once the employer meets that burden. That is how the Administrative Law Judge (ALJ) used the presumption here. See J.A. 13, 29, 40-43. The presumption does not forbid use of the "true doubt" rule, because the presumption's "only office is to control the result where there is an entire lack of

9 Ben. Rev. Bd. Serv. (MB) 936, 939 (1979), rev'd on other grounds, 627 F.2d 455 (D.C. Cir. 1980), rev'd on other grounds, 455 U.S. 608 (1982).

[3] Some courts have stated generally that the statutory policy of resolving doubtful factual questions in favor of a claimant results in "a less stringent standard of persuasion" than the "preponderance-of-credible-evidence test." *Young & Co.* v. *Shea*, 397 F.2d 185, 188, on petition for rehearing, 404 F.2d 1059, 1061 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); see also *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481-482 (5th Cir. 1986). We do not read those decisions as allowing claimants to prevail without having adduced substantial credible evidence in support of their claims, and we therefore do not read them as advocating a "true doubt" rule materially different from the Director's.

competent evidence." *Del Vecchio*, 296 U.S. at 286. In *Maher*, as in any "true doubt" case, there was competent evidence on each side, and the ALJ resolved the case "upon the whole body of proof pro and con," as *Del Vecchio* instructs.[4] *Id.* at 287; see

[4] Maher also unsuccessfully attempts to argue that use of the "true doubt" rule is inappropriate as a matter of policy. Thus, Maher asserts (Br. 43-45) that the rule cannot be justified as part of a "quid pro quo" under which the LHWCA is construed liberally in favor of claimants to ensure that they obtain a prompt and certain recovery, because the employer's side of the bargain—definite and lower limits on liability—is not present. This Court has concluded otherwise, see Gov't Br. 26, and we doubt that other maritime employers would share Maher's view that tort liability is preferable to the LHWCA's payment of only two-thirds an injured worker's wages, subject to a statutory cap, 33 U.S.C. 906(b), 908(a), and medical expenses; relief from strict liability for unseaworthiness, see 33 U.S.C. 905(b); *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); and participation in an employee's third-party recoveries to reduce LHWCA liabilities, 33 U.S.C. 933.

Maher's amici also incorrectly imply (NAWE Br. 18 & n.15) that LHWCA injury and illness rates have declined in the past ten years, even though their own authority shows that the rates for some of the less hazardous covered employment (in water transportation services) have not declined, and remain more than 50% higher than the national average. Pacific Maritime Ass'n, Ann. Rep. 42 (1993); see also U.S. Dep't of Labor, Employment Standards Admin., *Longshore and Harbor Workers' Compensation Act, Annual Report on Administration of the Act During Fiscal Year 1992*, at 4 (1993) (recent decrease in *number* of injuries "may reflect general economic factors"). Moreover, statistics from the Department's Bureau of Labor Statistics (see Maher Br. 35; NAWE Br. 18 n.15) show that in 1992 an equal if not larger part of LHWCA-covered employment—shipbuilding and repair work, see 33 U.S.C. 902(3)—recently had the second-highest rate of injury and illness in the nation. See Bureau of Labor Statistics, U.S. Dep't

J.A. 43-55. Nor is Maher accurate in asserting (Br. 16) that the ALJ in its case never found the evidence in equipoise: the ALJ expressly found that the evidence was "equally probative and conflicting." J.A. 34; see also J.A. 50, 55.

Use of the "true doubt" rule does not undermine the ALJ's factfinding function, or subvert the substantial evidence standard of review. See Maher Br. 27-30, 37-42; Greenwich Br. 46-49. Under the "true doubt" rule, the claimant always bears the burden of adducing competent evidence that would, standing alone, support an award of benefits. The ALJ then weighs that evidence against the evidence introduced by the employer. The Benefits Review Board properly vacates awards that do not explain how the ALJ weighed the relevant conflicting evidence, precisely because "[t]he resolving doubts rule * * * should not become an easy device with which administrative law judges can abdicate their primary responsibility as hearing officers to weigh the evidence and make factual findings." *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981). Courts of appeals, in turn, review under a substantial evidence standard both those close cases in which the ALJ has

---

of Labor, *Workplace Injuries and Illnesses 1992* (Dec. 15, 1993); cf. 29 C.F.R. Pts. 1917, 1918 (special health and safety standards applicable to maritime employment). Maher's assertion (Br. 43) that longshore workers no longer benefit from special rules historically fashioned to protect maritime workers is also suspect. See 33 U.S.C. 908(i), 915, 916; *Morewitz* v. *Andros Compania Maritima, S.A.*, 614 F.2d 379, 382 n.6 (4th Cir. 1980); *Wooten* v. *Skibs A/S Samuel Bakke*, 431 F.2d 821, 823 (4th Cir. 1969); *Capotorto* v. *Compania Sud Americana de Vapores Chilean Line*, 541 F.2d 985, 988 (2d Cir. 1976) (Oakes, J., dissenting).

determined that evidence is *not* in equipoise (see *Sprague* v. *Director, OWCP*, 688 F.2d 862, 868 n.12 (1st Cir. 1982)), and those in which the ALJ has determined that it is. See *Old Ben Coal Co.* v. *Battram*, 7 F.3d 1273, 1274-1276 (7th Cir. 1993); *F.H. McGraw & Co.*, 145 F.2d at 888. If the evidence is not close enough for the ALJ rationally to find it of "equal weight," a court will reverse the ALJ's decision. See *Peabody Coal Co.* v. *Director, OWCP*, 972 F.2d 880, 883 (7th Cir. 1992).[5] For the same reasons, there is no merit to Maher's argument (Br. 32-37) that the "true doubt" rule operates like an irrational presumption in violation of due process. See also *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281 (1993).

b. We showed in our opening brief (Gov't Br. 26-33) that the "true doubt" rule under the BLBA is authorized by statute and regulation. Respondent Greenwich Collieries does not seriously contest the Director's authority under the statute,[6] but instead

---

[5] Maher also appears to argue (Br. 5-6) that the ALJ's decision in Maher's case was not supported by substantial evidence. We believe the evidence was sufficient to support the ALJ's decision. Factually similar cases have been upheld under state workers' compensation laws. See, *e.g.*, *City of Seymour* v. *Industrial Comm'n*, 131 N.W.2d 323 (Wis. 1964); *Dundee Woolen Mills* v. *Chism*, 219 S.W.2d 628 (Ark. 1949); *Mattfield* v. *Ward Baking Co.*, 221 N.Y.S.2d 224 (App. Div. 1961); 1 A. Larson, *The Law of Workmen's Compensation* § 12.21 (1993). In any event, that fact-bound issue does not warrant this Court's attention.

[6] Greenwich asserts that a report accompanying the 1972 BLBA amendments shows that Congress intended "that the burden [would] be placed on the claimant to prove the existence of pneumoconiosis" in cases where a statutory presumption did

argues (Br. 38) that 20 C.F.R. 718.3(c), if read literally, would apply the criminal law's "beyond a reasonable doubt" standard to BLBA cases. Section 718.3(c) requires only that the claimant be given the "benefit of all reasonable doubt," however, and in context it is best understood to encompass use of the "true doubt" rule. See Gov't Br. 29; see also Dep't of Labor, *Coal Mine (BLBA) Procedure Manual*, ch. 2-100, ¶ 3(b)(2) (Feb. 1980).

Greenwich also inaccurately describes (Br. 9-10, 39) the Department's comments accompanying the amendment of a different regulation governing death due to pneumoconiosis, 20 C.F.R. 718.205(d), in light of the 1981 amendments to the BLBA. The Department did not say (see Greenwich Br. 39) that claimants would carry the burden of proving necessary facts by the weight of the evidence. The commentary instead stated that a claimant has an initial burden, which then shifts to the coal mine operator, and that "the ultimate disposition of the claim is to be determined by the weight of the evidence." 48 Fed. Reg. 24,278 (1983). The commentary also tracks the understanding of the sponsors of the 1981 amendments, see 127 Cong. Rec. 31,747 (1981) (Rep. Perkins); *id.* at

---

not apply. Greenwich Br. 42 (quoting S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972)). The quoted report does not specify, however, whether it refers to a burden of production or a burden of persuasion, and it adds the qualification that "judgment will be allowed to be exercised in determining the validity of claims in such cases." S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972). The report therefore does not stand for the proposition that claimants must bear the risk of non-persuasion in close cases, and it certainly does not show that the Secretary misused authority granted under later (1978) BLBA amendments. See Gov't Br. 28-29.

31,977 (Sen. Hatch), and thereby undermines any notion that the 1981 amendments disapproved use of the "true doubt" rule.[7]

Greenwich also argues (Br. 49) that the "true doubt" rule is unfair as a matter of policy, because coal companies have been singled out for treatment different from that accorded other litigants. But BLBA employers have not been singled out any more than the Veterans Administration, grant recipients, drug and pesticide manufacturers, or mine operators have been singled out under regulatory programs requiring those parties to bear the risk of non-persuasion. See Gov't Br. 21-22. Nor is there merit to the argument (Greenwich Br. 46-49; American Insurance Association (AIA) Br. 25; Nat'l Coal Ass'n (NCA) Br. 13-17) that the rule is applied arbitrarily and inconsistently. Greenwich does not dispute the current low approval rate of black lung claims, even with the "true doubt" rule (see Gov't Br. 33 n.19), and it recognizes that courts of appeals can correct improper applications of the rule. See Greenwich Br. 49 n.58 (citing *Peabody Coal, supra*).[8] And there is

---

[7] Contrary to Greenwich's assertions (Br. 13-14 n.20, 40 n.41), the Director did rely on Section 718.3(c) in *International Anthracite Corp.* v. *Gilbert*, No. 92-3195 (3d Cir. May 14, 1993), and did contend prior to oral argument in that case that the "true doubt" rule placed the burden of persuasion on the party opposing benefits. See Br. of Fed. Resp. in *Gilbert* at 23-24, 32-34. In complaining (Br. 40 n.41) that the Director did not rely on Section 718.3(c) in *Peabody Coal Co.* v. *Director, OWCP*, 972 F.2d 880 (7th Cir. 1992), Greenwich fails to mention that *Peabody* was governed by the Department's interim presumption regulation, 20 C.F.R. 727.203, not by Section 718.3(c).

[8] As Greenwich notes (Br. 48 n.56), courts have sometimes stated that under the Department's permanent BLBA regulations the claimant has the burden of proving facts by a prepon-

nothing more inherently "subjective" or "arbitrary" about the "true doubt" rule than about the alternative: if ALJs were forced to decide evenly balanced cases in favor of the employer, that rule too could become a "convenient mechanism for ALJs to avoid making difficult decisions." AIA Br. 27. There needs to be some mechanism to break evidentiary deadlocks, and that is what any allocation of the burden of persuasion, including the "true doubt" rule, achieves.

2. As we explain in our opening brief (at 35), our submission regarding the interpretation of Section 7(c) of the APA, 5 U.S.C. 556(d), harmonizes the language of that Section and this Court's decisions. We show that the first sentence of Section 7(c), which allocates the "burden of proof," imposes only a burden of production, not the risk of non-persuasion. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983). The third sentence of Section 7(c), which requires rules or orders to be supported by and in accord with reliable, probative and substantial evidence, does not allocate the risk of non-persuasion, but instead requires that evidence be evaluated under a preponderance-of-the-evidence standard of proof, rather than a higher (*e.g.*, clear-and-convincing)

---

derance of the evidence. Some of the same courts, however, have also applied or approved use of the "true doubt" rule. See *Skukan* v. *Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), petition for cert. pending, No. 93-964; *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706 (7th Cir. 1993), petition for cert. pending, No. 93-935; *Greer* v. *Director, OWCP*, 940 F.2d 88 (4th Cir. 1991). Read together, those cases show that courts require sufficient evidence from claimants to justify an award, but will allow a factfinder who examines the evidence, and adequately explains why he finds it equally balanced, to resolve remaining doubt in favor of the claimant.

standard. Gov't Br. 35-36; *Steadman* v. *SEC*, 450 U.S. 91, 98-102 (1981).

Respondent Greenwich Collieries essentially concedes (see Br. 27) that "burden of proof" means only "burden of production," but insists that the preponderance-of-the-evidence standard in the third sentence of Section 7(c) assigns the risk of non-persuasion to "[a]ny party that needs a fact to be found" and prohibits "an affirmative finding of fact on something less than the weight of the evidence." Greenwich Br. 24. Greenwich's argument is contrary to logic and the practice of courts and agencies.

There is nothing talismanic about seeking an "affirmative" finding of fact. For example, claimants under the LHWCA who establish an inability to perform their former jobs are entitled to benefits for total disability unless their employers prove, by a preponderance of the evidence, that suitable alternative employment is readily available.[9] See Gov't Br. 21 & n.11. The courts have recognized that the risk of non-persuasion does not have to turn on which party "needs" a fact to prevail, and whether a factual finding is expressed as an affirmative or negative proposition. See Gov't Br. 21-22, 41 and authorities cited;[10]

---

[9] Respondent Maher Terminals (Br. 16) cites *Newport News Shipbldg. & Dry dock Co.* v. *Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979), for the proposition that an employer, in contesting total disability, may be seen as the proponent of a finding of less than total disability. That distinction is a matter of semantics; the employer could as easily have been described as the opponent of a finding of total disability. It does not change the fact that the claimant requires a finding of total disability in order to obtain the requested benefits.

[10] Greenwich's characterizations of some of the cases in which courts have concluded that Section 7(c) governs only the

McCormick on Evidence § 337 at 570 (E. Cleary 4th ed. 1992) (allocating burden of persuasion on whether averment is negative rather than affirmative "would place an entirely undue emphasis on what is ordinarily purely a matter of choice of forms," and allocating to "the party to whose case the element is essential * * * simply restates the question").

Moreover, if Greenwich's theory were correct, then the use of statutory and regulatory presumptions would violate the preponderance-of-the-evidence standard. Such presumptions allow findings of "affirmative fact" based on the failure of a party to produce sufficient evidence to rebut the presumption. See, *e.g.*, 30 U.S.C. 921(c) (Black Lung Benefits Act); 20 C.F.R. 727.203 (Department of Labor's black lung interim presumption); 33 U.S.C. 920(a); Greenwich Br. 7 (certain former BLBA presumptions "required employers to affirmatively disprove a claimant's entitlement" and "placed the burden of persuasion on the employer to prove the negative of one or more of

---

burden of production are also semantic exercises. It says (Greenwich Br. 29 & n.32), for example, that in *Alameda County Training & Employment Bd.* v. *Donovan*, 743 F.2d 1267, 1269 (9th Cir. 1984), and *Maine* v. *United States Dep't of Labor*, 669 F.2d 827, 829 (1st Cir. 1982), the parties seeking to be relieved of a burden were claiming money from the government. The cases are more naturally described differently: The government sought to recover from the parties grant money that it alleged (presumably "affirmatively") had been misspent, but the courts allocated the burden of persuasion to the grantees. Similarly, in *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1003 (D.C.C. 1976), the government sought to suspend use of a registered pesticide, see Greenwich Br. 29, and to do so it "needed" a finding that an imminent hazard existed. Yet the court of appeals allocated the burden of persuasion to the company.

the facts essential for entitlement"). That also is not the law, in civil litigation or in agency adjudication. Instead, allocation of the risk of non-persuasion is a matter of policy and fairness based on experience in different situations. See Gov't Br. 19.

3. The American Insurance Association concedes (Br. 4-5) that *Transportation Management* does not allow Section 7(c) to be construed to assign the burden of persuasion, but asks the Court to overrule *Transportation Management* on this point. According to AIA, *Transportation Management* construed Section 7(c) contrary to the common understanding of "burden of proof" and to the context and legislative history of Section 7(c)'s enactment. AIA Br. 4-19. Aside from the fact that that argument was not made or passed on below and is raised in this Court only by an amicus (see, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979)), it is not persuasive. AIA has not established any adequate justification for departing from the fundamental principle of stare decisis on an issue of statutory construction. See *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171-175 (1989). Moreover, as we demonstrate in our opening brief (at 37-40), the language and context of Section 7(c) support the holding in *Transportation Management*.

Contrary to AIA's argument, courts and Congress have not commonly understood that "burden of proof" necessarily means "burden of persuasion." For example, as the court of appeals recognized (Pet. App. 9a), the "burden of proof" imposed by Section 301(a) of the Federal Power Act, 16 U.S.C. 825(a), was construed to mean "burden of going forward with the evidence" only three years before Section 7(c) was enacted. *Northwestern Elec. Co.* v. *Federal Power*

Comm'n, 134 F.2d 740, 743 (9th Cir. 1943), aff'd, 321 U.S. 119 (1944). This Court and other courts have also construed "burden of proof" in particular circumstances to mean only the burden of going forward or burden of production. See, *e.g.*, *Ward's Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 660 (1989); *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932); *Hawes* v. *Georgia*, 258 U.S. 1 (1922); *Garmeada Coal Co.* v. *Mabe*, S.W.2d 829, 830 (Ky. 1949); *McKemie* v. *McKemie*, 45 S.E. 2d 456, 458 (Ga. Ct. App. 1947).[11] Congress's use of the phrase "burden of proof" in Section 7(c) therefore does not foreclose inquiry into whether it intended that phrase to mean "burden of persuasion," "burden of production," or both. See also Gov't Br. 31.

Section 7(c)'s larger statutory context also shows that *Transportation Management*'s holding was

---

[11] In *Radio Corp. of America* v. *Radio Eng'g Laboratories, Inc.*, 293 U.S. 1, 7-8 (1934), cited by AIA (Br. 9), this Court adopted a different interpretation, but recognized that courts had not defined the standard in terms of scientific accuracy or literal precision. Similarly, AIA (Br. 10) mistakenly relies on *Kerner* v. *Flemming*, 283 F.2d 916, 921 n.8 (2d Cir. 1960), for the proposition that Congress spoke clearly in using the phrase "burden of proof" as the way to assign the burden of persuasion under certain tax statutes. In fact, *Kerner* views those statutes as examples of Congress's assigning "*a* burden of proof," and does not say whether that burden was one of production or persuasion. *Ibid.* (emphasis added). AIA also mistakenly cites (Br. 14-15) *Kerner* as authority for construing Section 7(c) to impose a burden of persuasion. In fact, the court merely assumed that Section 7(c) could be construed that way and effectively held the opposite. See *Kerner*, 283 F.2d at 922 (remanding for the Secretary, not the claimant, to show Social Security claimant's inability to do suitable alternative employment); 3 K. Davis, *Administrative Law Treatise* § 16.9 at 260-261 (2d ed. 1980) (explaining *Kerner* in this manner).

correct. AIA urges (Br. 11) that Section 7(c) be construed to require what AIA describes as the traditional rule that a party seeking to change the status quo bears the burden of persuasion. As we show in our opening brief (Gov't Br. 19, 39), however, allocation of the risk of non-persuasion should not invariably turn on what happens to be the "status quo" when one party requests (or an agency itself proposes) agency action. AIA's rule would also make administrative proceedings more rigid than court proceedings, a result Congress could not have intended. See Gov't Br. 42-43; AIA Br. 12 n.9 (admitting that in civil litigation its rule has exceptions).

Section 7(c)'s legislative history also supports *Transportation Management*. As AIA recognizes (Br. 18-19), the committee reports accompanying the bills that the House and Senate passed both speak to the burden of production, and not the burden of persuasion, in describing the "burden of proof" under Section 7(c). See also *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1014-1015 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977). Those reports are the best evidence of congressional intent and support *Transportation Management*, which relied on *Environmental Defense Fund*. See Gov't Br. 38-40.

In attempting to minimize the import of that legislative history, AIA merely repeats an argument (AIA Br. 15-16) that *Environmental Defense Fund* properly rejected: that when legislators changed an earlier bill, which provided that the proponent of a rule or order had the "burden of proceeding," to the enacted language of Section 7(c), which provides that the proponent has the "burden of proof," they intended to change the relevant burden from one of producing

evidence to one of both producing evidence *and* bearing the risk of non-persuasion. The Senate Committee Print that explained changes in the earlier bill did not, however, address the reasons for the change in question. See S. Doc. No. 248, 79th Cong., 2d Sess. (*Legislative History of the Administrative Procedure Act)* 11, 30-31, 158 (1946). Interpretation of Section 7(c) should not rest on such a "mute intermediate legislative maneuve[r]."[12] *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947); see also *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979); *Environmental Defense Fund*, 548 F.2d at 1015.

---

[12] AIA argues (Br. 16) that the Committee Print indicates an intended change in meaning by stating that "[t]he provision relating to the burden of proof is the standard rule." S. Doc. No. 248, *supra*, at 31. The undefined "standard rule" is more likely, however, to be the rule that litigants must support their cases with substantial probative evidence, rather than a rule governing allocation of risk of non-persuasion. See *Attorney General's Manual on the Administrative Procedure Act* 75 (1947) (quoting the Committee Print explanation and stating that "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward' "); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946) ("no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper. * * * [E]very proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor"). AIA also mistakenly asserts (Br. 13-15) that decisions prior to *Environmental Defense Fund* construed Section 7(c) to allocate the risk of non-persuasion. To the contrary, the only case prior to *Environmental Defense Fund* that addressed the issue construes Section 7(c) to govern only the burden of production. See *Old Ben Coal Corp.* v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 39-40 (7th Cir. 1975).

4. In our opening brief we show (Gov't Br. 43-47) that Section 7(c)'s "burden of proof" requirement applies only "[e]xcept as otherwise provided by statute," 5 U.S.C. 556(d), and that even if "burden of proof" in Section 7(c) meant "burden of persuasion," adjudications under the BLBA and LHWCA would be excepted from that requirement. We also show (Gov't Br. 45 & n.27) that statutes could "otherwise provid[e]" within the meaning of Section 7(c), and thereby supersede its "burden of proof" requirement, without doing so "expressly" pursuant to Section 12 of the APA, 5 U.S.C. 559. Respondents and their amici attempt to avoid the specific exception that Section 7(c) recognizes by insisting that Section 12 governs. See Greenwich Br. 37-43; Maher Br. 42; AIA Br. 19-25; NAWE Br. 27-28. But that construction eliminates Section 7(c)'s own "express" exception.[13]

Greenwich also argues (Br. 20, 33-42) that the BLBA and LHWCA do not otherwise provide for the burden of persuasion. With respect to the BLBA, Greenwich recognizes (Br. 36) that under 30 U.S.C. 956 the APA does *not* apply "[e]xcept as otherwise provided in this chapter." Greenwich nevertheless tries to show that Section 7(c) of the APA applies because (1) it is incorporated through a series of

---

[13] Greenwich Collieries also mistakenly asserts (Br. 20) that until this litigation there was no serious dispute that the APA's hearing provisions are fully applicable to the BLBA and LHWCA. That assertion overlooks the en banc Fourth Circuit's holding that the BLBA superseded APA evidentiary requirements. See *Stapleton* v. *Westmoreland Coal Co.*, 785 F.2d 424, 434 n.8 (Hall, J.); *id.* at 465 (Widener, J. concurring and dissenting) (4th Cir. 1986), rev'd on other grounds *sub nom. Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987). See also 86-327 (*Mullins Coal*) Br. for Fed. Resp. 34 n.30.

cross-references that the Secretary has no power to override by regulation, and (2) if the Secretary had power, he did not exercise it.[14] Greenwich Br. 36-42. Greenwich's first argument fails because it misreads one of the incorporated provisions. The APA applies to the BLBA through incorporation of Section 19(d) of the LHWCA, 33 U.S.C. 919(d), which in turn provides that Section 5 of the APA, 5 U.S.C. 554, applies to LHWCA adjudications "[n]otwithstanding any other provisions *of this [Act]*" (emphasis added). See Gov't Br. 43. Because the referenced statute is the LHWCA, not the BLBA, Greenwich errs in construing 33 U.S.C. 919(d) to require the APA to apply notwithstanding contrary provisions in the *BLBA*. Greenwich's second argument also fails because, as discussed above and in our opening brief (at 29-30, 44), the Secretary's regulations do embody the principle of the "true doubt" rule. 20 C.F.R. 718.3(c).

Respondents also err in arguing (Greenwich Br. 33-35) that the LHWCA provides no exception to the "burden of proof" requirement in Section 7(c) of the APA. The principle that doubts are to be resolved in favor of the claimant was already established as a rule of construction under the LHWCA when the APA was enacted, and there is no indication that Congress intended the APA to revise the LHWCA in that

---

[14] Greenwich also erroneously argues (Br. 36) that although the APA generally does not apply to the BLBA and Mine Safety and Health Act, Congress expressly identified specific sections of those statutes that would supersede specific provisions of the APA. The cited Mine Act provisions are generally silent, however, except when they specify that certain provisions of the APA will not apply to provisions *outside* the Mine Act. See 30 U.S.C. 812, 823(b)(2) (advisory committees and ALJs).

respect. See Gov't Br. 46. Moreover, Section 23(a) of the LHWCA, 33 U.S.C. 923(a), provides that administrative adjudicators generally "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure." Allocation of the burdens of production and persuasion have been identified as rules of evidence. See AIA Br. 9 (citing 9A *Uniform Laws Annotated*, Uniform Rule of Evidence 1(4) (1965)); Cal. Evid. Code § 115 (West 1966). The authorities Greenwich cites do not address whether Section 23(a)'s "rules of evidence" include rules allocating the burdens of production and persuasion. See also AIA Br. 23-24. In any event, as we have shown above (page 16, *supra*; see also Gov't Br. 45-47), express statutory language is not necessary to create an exception to Section 7(c)'s "burden of proof" requirement.

CONCLUSION

The judgments of the court of appeals in *Maher Terminals* and *Greenwich Collieries* should be reversed, and the cases should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

APRIL 1994

No. 93-744

Supreme Court, U.S.
FILED
MAR 30 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
GREENWICH COLLIERIES, *et al.*,
Respondent.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
MAHER TERMINALS, INC., *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPOYERS, SHIPBUILDERS COUNCIL OF AMERICA, INC., MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AND THE AMERICAN WATERWAYS SHIPYARD CONFERENCE IN SUPPORT OF RESPONDENTS

FRANKLIN W. LOSEY
General Counsel
SHIPBUILDERS COUNCIL OF AMERICA
4301 N. Fairfax Dr.
Arlington, VA 22203
(703) 276-1700

CHARLES T. CARROLL, JR.*
THOMAS D. WILCOX
THOMAS D. WILCOX, P.C.
2011 Eye Street, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE TRUE DOUBT "RULE" IS LEGAL SOPHISTRY PUSHED BY A FEDERAL AGENCY BENT ON IGNORING CONGRESSIONAL COMMANDS AND DECISIONS OF THIS COURT	6
A. The recent birth and practical effects of the rule	6
B. The alleged rule finds no support in the original LHWCA and its subsequent history	8
C. The LHWCA reforms of 1972 and 1984 lend no credence to the alleged rule	11
D. The judicial response to the 1972 reform Amendments gives no credence to the "true doubt rule"	15
E. The Department of Labor continues to ignore the 1972 Amendments and opinions of this Court	16
II. THE FEDERAL PETITIONER IS ATTEMPTING TO RENDER THE APA MEANINGLESS	19
A. Despite Petitioner's contention to the contrary, The 1972 LHWCA reforms expressly incorporate § 7(c) of the APA	19
B. Section 7(c) of the APA places the ultimate burden of persuasion on LHWCA claimants consistent with this Court's reasoning in *Transportation Management* and *Steadman*	22
C. The assignment of the burden of persuasion by the DOL supersedes APA authority	27

TABLE OF AUTHORITIES—Continued

Page

III. THE ALLEGED "TRUE DOUBT RULE" IS A LITIGATING POSITION ADVANCED "ON BEHALF OF THE SECRETARY" AND DUE NO DEFERENCE BY THIS COURT UNDER THE CIRCUMSTANCES 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES:

Page

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932) 10
Bath Iron v. White, 584 F.2d 569 (1st Cir. 1978) 5
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 27
Burlington Truck Lines v. U.S., 371 U.S. 156 (1962) 30
Chevron, USA., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 29
Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, —— U.S. —— (1993) 8, 21, 24, 26
Cowart v. Nicklos Drilling Co., 505 U.S. ——, 112 S.Ct. 2589 (1992) 15, 17, 29
Del Vecchio v. Bowers, 296 U.S. 280 (1935) 7, 10
Director, OWCP v. Maher Terminals, Inc., 992 F.2d 1277 (1993) 2
Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983) 16, 17
Director, OWCP v. Rasmussen, 440 U.S. 29 (1979) 16
Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 15
Fidelity & Casualty Co. of New York v. Burris, 59 F.2d 1042 (D.C. Cir. 1932) 11
Freeman United Coal Mining Co. v. Director, OWCP, 988 F.2d 706 (7th Cir. 1993), *pet. for cert. pending*, No. 93-935 5
Freeman United Coal Mining Co. v. Director, OWCP, 999 F.2d 291 (7th Cir. 1993) 30
Grizzle v. Pickands Mather Coal Co., 994 F.2d 1093 (4th Cir. 1993) 3, 5
John Hancock Mutual Life Ins. Co. v. Harris Trust, —— U.S. —— (1993) 29
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 9
Martin v. OSHRC, —— U.S. ——, 111 S.Ct. 1171 (1991) 29
Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. 624 (1983) 10, 15, 17

TABLE OF AUTHORITIES—Continued

	Page
Mullins Coal v. Director, OWCP, 484 U.S. 135 (1987)	7
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)	3, 22
New York Central R.R. v. White, 243 U.S. 188 (1917)	9
Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977)	12, 16, 17
Parsons Corp. of Cal. v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980)	6
Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 (1980)	10, 15, 17
Provance v. United States Steel Corp., 1 BLR 1-483 (1978)	7
Ryan-Walsh v. Trainer, 601 F.2d 1306 (1979)	16
Skukan v. Consolidation Coal Co., 993 F.2d 1228 (6th Cir. 1993), *pet. for cert. pending*, No. 93-964	5
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	9
Steadman v. Securities and Exchange Commission, 450 U.S. 91 (1981)	3, 24, 25
U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982)	7, 9, 27
Voris v. Eikel, 346 U.S. 328 (1953)	10
Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969)	6, 11

STATUTES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*:	
5 U.S.C. § 551(4)	28
5 U.S.C. § 552	27
5 U.S.C. § 553	28
5 U.S.C. § 554	12, 19
5 U.S.C. § 556(c)	27
5 U.S.C. § 556(d)	*passim*
5 U.S.C. § 559	25, 27

TABLE OF AUTHORITIES—Continued

	Page
Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*	2
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:	
33 U.S.C. § 919(d)	12, 19, 21
33 U.S.C. § 920	3, 10, 14
33 U.S.C. § 923(a)	13, 20, 21
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576	11
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426	11
Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364	26
National Labor Relations Act, 29 U.S.C. § 141 *et seq.*	23
Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*	21, 22
20 C.F.R. § 702.332	19
20 C.F.R. § 702.333	17
20 C.F.R. § 702.339	8
20 C.F.R. § 702.408	8
20 C.F.R. § 801.402	17
20 C.F.R. § 802	12

LEGISLATIVE:

Senate Comparative Print, June 1945, [Senate Document No. 248, 79th Congress, 2d Session (1946)]	25
S. Rept. 92-1125, 92d Congress, 2d Session	12, 14
H. Rept. 92-1441, 92d Congress, 2d Session	12, 14
S. Rept. 98-81, 98th Congess, 1st Session	14
Conf. Report to S. 38, H. Rept. 98-1027, 98th Congress, 2d Session	14

OTHER:

Attorney General's Manual on the Administrative Procedure Act (1947)	25, 28
A. Larson, 2B *The Law of Workmen's Compensation* (1993)	9, 31, 21

TABLE OF AUTHORITIES—Continued

	Page
Annual Report on the Administration of the LHWCA for Fiscal Year 1992, Employment Standards Administration, U.S.DoL (1993)	18
K. Culp Davis, *Administrative Law of the Eighties*, Supplement to *Administrative Law Treatise*, §§ 6:35-6:39, p. 219 (1989)	25
Longshore Desk Book, APA 1-5, The Benefits Review Board (1987)	19
Model Adjudication Rules, Administrative Conference of the United States (Dec. 1993)	4
Workplace Injuries and Illnesses in 1992, Bureau of Labor Statistics (December 15, 1993)	18
9 Wigmore, *Evidence* § 2498 (Chadbourn rev. 1981)	8

THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business throughout the U.S. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Collectively, the member companies constitute about 95 percent of the Nation's shipbuilding industrial mobilization base. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the maritime terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

The American Waterways Shipyard Conference is a not-for-profit conference of the American Waterways Operators. Its members build and service vessels for the barge and towing industry, and many of its 50 members are covered by the LHWCA.

Amici collectively comprise the vast majority of insured and self-insured employers covered by the LHWCA and a group self insurance facility, and thus have considerable expertise in adjudicating claims subject to the Act.

Amici hasten to point out, however, that they are not covered by the Black Lung Benefits Act ("BLBA"). Therefore, *Amici* are content to leave argument concerning *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3rd Cir. 1993) and the proper interpretation of this statute to Respondent Greenwich Collieries and its supporting *Amici*. These *Amici* will concentrate on *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277 (3rd Cir. 1993), the case below involving the LHWCA, which Act and its regulations differ from the BLBA.

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

SUMMARY OF ARGUMENT

The "true doubt rule" ("rule") rejected by the Court below is the Federal Petitioner's latest zeitgeist in the field of administrative law. The so-called "rule" results from confusion generated by the interplay among three Federal Statutes—the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 901 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and several opinions of this Court.

Despite this statutory interplay, the fundamental question is whether or not the alleged rule is sanctioned by the APA § 7(c), 5 U.S.C. § 556(d), standards that Congress expressly incorporated into the LHWCA in 1972. *The answer turns on the fact that the alleged rule is not and has never been found in the LHWCA, and does not appear in any of the Department's published regulations.* This absence of statutory authority and permissible legislative regulation, readily admitted by Petitioner, Brief for Petitioner ("Brief") at 15, 23, places the fate of the

rule squarely within the adjudication standards and proscriptions of the APA § 7(c).[1]

The alleged rule clearly flies in the face of the burden of proof and evidentiary standards of § 7(c) of the APA. Despite this fact, the rule has been cleverly fashioned by the Federal Petitioner to supersede these standards in direct violation of the APA's anti-supersedure provision, 5 U.S.C. § 559. Consequently, the rule effectively impairs the jurisprudence governing claims covered by the LHWCA, including the two principal decisions of this Court that regulate the proper use of the Act's statutory presumptions, 33 U.S.C. § 920.

Not only is the rule without basis in the controlling LHWCA, the rule cannot be construed to co-exist with the two principal non-LHWCA opinions of this Court upon which the Federal Petitioner relies heavily. *Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981): and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), easily the most misunderstood authority in the Federal Petitioner's arsenal.

The Federal Petitioner advances the rule under cover of the considerable judicial gloss that was attached to the LHWCA over the years before the massive reforms made by Congress in 1972, P.L. 92-576, and in 1984, P.L. 98-426, and a claim of deference to the Labor Department's alleged "longstanding" *policy* expertise and administrative judgment. This last claim is somewhat puzzling given the fact that, according to some authorities, the rule was first adopted by the *non-policy* making Benefits Review Board ("BRB"). But whatever the origin of the rule, some element of the Department of Labor has allowed its notions of jurisprudence to thwart Congress' 1972 adjudicatory reforms to the LHWCA, and several

---

[1] Equally true of the Black Lung Benefits Act ("BLBA"), see *Grizzle v. Pickands Mather Coal Co.*, 994 F.2d 1093, 1096 (4th Cir., 1993) ("The Director of the Office of Workers' Compensation Programs admits that 'the Black Lung Benefits Act does not explicitly allocate the risk of non-persuasion in black lung cases.' ") (citations omitted).

opinions of this Court that have removed 45 years of prior judicial gloss from the Act's early interpretations.

Amici concede that in one regard the Petitioner is acting in consonance with several provisions of the APA, specifically 5 U.S.C. §§ 552 and 553, requiring respectively that all rules, substantive or interpretive, be published in the *Federal Register* and that substantive rules, i.e., those promulgated pursuant to legislative authority, be subject to the Act's rulemaking procedures. Obviously this alleged "rule," which lacks the substance of a *bona fide* rule—the hallmark of a litigating position—need not be made to comply with these two APA formalities.

The true doubt rule is, then, constructed entirely of bureaucratic revelation, and should be viewed—not as the administrative determination that it is claimed to be—but as the insupportable litigating position of the Department of Labor that it actually is. Unless rejected, the rule is bound to haunt future administrative determinations in other settings that also implicate the proper assignment of the "burden of proof" under the APA.[2]

Amici respectfully submit that the Third Circuit's construction of the LHWCA and the APA is consistent with this Court's recent decisions concerning statutory interpretation. The administrative interpretation advanced by the Federal Petitioner contradicts an unambiguous statutory scheme and its legislative history and deserves no deference by this Court. Therefore the decisions below should be affirmed by this Court.

[2] One only need read the latest pronouncement of the Administrative Conference of the United States to appreciate Agency confusion over the APA's proper allocation of the burden of proof—"The ultimate burden of persuasion in any case depends on the substantive statute involved and the burden of persuasion may be allocated among parties, or shift from one party to another, depending on the issue. *As a consequence, the model rule only addresses the initial burden of going forward with the evidence.*" *Model Adjudication Rules,* Administrative Conference of the United States (Dec. 1993), p. 105 (emphasis added).

It appears to *Amici* that agencies other than the DoL are either every bit as confused by the present state of affairs or are lining up to claim the right to assign the burden of persuasion despite the plain language of the APA, which assigns the entire burden of proof "except as otherwise provided by statute." 5 U.S.C. 556(d). There are no such statutory exceptions in either of the two cases now before the Court.

ARGUMENT

An analysis of both *Maher Terminals* and *Greenwich Collieries* and the related cases noted below that are pending a writ of *certiorari* reveal that the Petitioner's arguments in support of the alleged "true doubt rule" ("rule") boil down to deferring what is essentially a "remedial alternative" conceived by the non-policy making Benefits Review Board ("BRB") and now advanced "on behalf of the Secretary of Labor" through litigation.

In its Brief ("Brief") on the merits, Petitioner initially labels the rule a "principle of adjudication" (p. 14). Later it becomes a "settled evidentiary rule" (p. 18), an "administrative answer" (p. 19), an "administrative practice" (p. 26), and finally "a rule of construction" (p. 46). This muddling of jurisprudence is remarkable only in that it is entirely consistent with Petitioner's prior inconsistent arguments advanced below and in other courts.

Adding to this confusion, two circuit courts in BLBA cases recently have labeled the rule a "judicial construct," *Skukan v. Consolidation Coal Co.,* 993 F.2d 1228, 1236 (6th Cir. 1993), pet. for cert. pending, No. 93-964; and *Freeman United Coal Mining Co. v. Director, OWCP,* 988 F.2d 706, 709-710 (7th Cir. 1993), pet. for cert. pending, No. 93-935, while upholding its validity. Another circuit, apparently accepting the rule has described it as another "presumption," *Grizzle v. Pickands Mather & Co.,* 994 F.2d 1093, 1097 (4th Cir. 1993).

In cases preceding the Department of Labor's ("DoL") recent claim of right to assign the burden of persuasion as a matter of policy, other circuits have referred in *dicta* to the resolution of doubtful factual questions as a "judicial policy," *Bath Iron v. White,* 584 F.2d 569 (1st Cir.

1978); a "statutory policy," *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); and an "overall humanitarian 'statutory' policy," *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980).

Only the court below has figured out that—no matter what label given the alleged rule or by whom—the rule is really a product of pure judicial gloss. The Third Circuit properly concluded that there is simply no basis within the LHWCA or the APA that authorizes the Secretary of Labor to embrace such a rule. Presumably, this is why the rule in fact does not appear in any of the Department's published regulations. As such, the rule is advanced despite the Department's lack of statutory authority to assign the burden of persuasion under the APA.

I. THE TRUE DOUBT "RULE" IS LEGAL SOPHISTRY PUSHED BY A FEDERAL AGENCY BENT ON IGNORING CONGRESSIONAL COMMANDS AND DECISIONS OF THIS COURT

A. The Recent Birth and Practical Effects of the Rule

Whether or not the "true doubt rule" is described in terms of evidence, practice or principle, the "rule" as presently formulated by the Federal Petitioner holds that the Department, either the Benefits Review Board ("BRB") or the ALJ, may assign the burden of persuasion to an employer contesting an LHWCA or a BLBA claim in either "close cases," Pet. for Cert. p. 17, or "when evidence is evenly balanced," Br. p. 19. Heretofore "equipoise" has been the Petitioner's preferred term of art triggering the rule, Pet. for Cert. p. 15.

The Federal Petitioner claims that this alleged "rule" has been followed since the dawn of the LHWCA (Br. at 23) and therefore does not violate the burden of proof requirement of the APA, if indeed APA § 7(c) even applies in the first place.[3] The Fourth Circuit, however,

[3] *Amici* note that the Federal Petitioner's latest fall back argument is to now deny that § 7(c) applies to LHWCA adjudications in the first place (Br. at 43). But see, II-A, *infra*.

dates it to a 1978 BRB opinion dealing with a BLBA disputed claim, a much more likely birthday.[4]

Regardless of the genesis of the true doubt rule, its net effect *in the LHWCA* context, coming into play as it supposedly does only after an employer's substantial evidence has defeated any benefit provided to a claimant by the Act's statutory presumptions, thus requiring the factfinder to decide a case on the basis of the record considered as a whole, *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982), is to undermine these two opinions completely and reverse the ultimate burden of proof, i.e., the risk of non-persuasion, assigned by the plain language of § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). See, II-B, *infra*.

Remarkably this "longstanding" rule was not even mentioned in the Federal Petitioner's brief seeking denial of *certiorari* in *U.S. Industries*, which is the last case to come before this Court concerning the proper construction of the Act's statutory presumptions. Curiously, some six years later, in *Mullins Coal v. Director, OWCP*, 484 U.S. 135 (1987), a Black Lung Benefits Act case dealing with that Act's statutory presumptions, the Federal Respondent filed a brief on the merits replete with references to the true doubt rule, citing as authority for the rule *Provance v. United States Steel Corp.*, 1 BLR 1-483 (1978).

Amici can't help but to speculate that it appears that the DoL must not have been ready to spring this "longstanding" rule on the Court in 1982, despite the fact that statutory presumptions and the true doubt rule are, at the very least, kissing cousins, and hence chose not to file a brief on the merits in *U.S. Industries*.

Springing up as it does shortly after *U.S. Industries*, the rule assumes the flavor of a "remedial alternative" to both that decision and its antecedent *Bowers*, the two

[4] *Grizzle v. Pickands Mather and Company/Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993) citing *Provance*, *infra*.

opinions of this Court that govern the proper use of the LHWCA statutory presumptions.

As a consequence of the "rule" the employer is saddled with an evidentiary burden—in cases arbitrarily designated "close" by an ALJ or the BRB—that bears no practical difference to the clear and convincing standard of persuasion required by the Courts or assigned by statute in special civil situations.[5]

Amici would also like to point out that evidentiary equipoise need never occur, as the LHWCA has built in safeguards designed to avoid this precise state of affairs.[6]

Any analysis of the "rule" must start with an examination of the original LHWCA and the sweeping reforms made to the Act by Congress in 1972 and 1984.

B. The Alleged Rule Finds No Support in the Original LHWCA and Its Subsequent History

The Longshore and Harbor Workers' Compensation Act ("LHWCA" "ACT"), 33 U.S.C. 901 *et seq.*, is a comprehensive federal statute enacted in 1927 after this Court held that state compensation statutes could not con-

[5] E.g., "[W]hen greater degrees of certainty are thought necessary," *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, —— U.S. —— (1993) (slip opinion at 19). Courts have required an elevated standard in certain civil situations involving fraud, wills, oral contracts, etc. See 9 Wigmore, *Evidence* § 2498 (Chadbourn rev. 1981).

Congress has also set a clear and convincing standard in certain civil situations, e.g., in extraordinary circumstances, a higher burden has been placed on the federal government, which is the party in possession records, in order to prevail against claims submitted by wounded veterans who cannot possibly be expected to produce records of the same quality. 38 U.S.C. 1154.

[6] The following provisions of the LHWCA are rendered superfluous whenever the true doubt rule is employed. The BRB may remand a case to an ALJ "for further appropriate action," 33 U.S.C. § 921(b)(4): either the BRB or the ALJ can "make such investigation or inquiry . . . to best ascertain the rights of the parties," 33 U.S.C. § 923(a), 20 C.F.R. § 702.339. This includes, whenever warranted, referring a case to another impartial specialist. 33 U.S.C. 907(e), 20 C.F.R. § 702.408.

stitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and that Congress could not delegate regulation of federal maritime jurisdiction to the states, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Congress subsequently tailored the Act to fill this gap and compensate certain classes of maritime workers injured or killed seaward of the so called *Jensen* line.

As with all such statutes, the Act accomplished this by compromising the common law rules effecting the interests of employers and injured workers. Similar state statutes had long been upheld by this Court from constitutional challenge, providing the statute provided a reasonably just substitute for common law rights. See, e.g., *New York Central R.R. v. White*, 243 U.S. 188 (1917). Congress then designed the Act to minimize contested claims by encouraging voluntary compensatory payments whenever possible, and the use of informal administrative proceedings, without resort to traditional litigation.[7]

This compromise certainly did not encompass rejection of the common law rules that place the burden of proof, and hence the burden of persuasion, on a party initiating a claim. Professor Larson's thoughts are instructive: "No amount of informality can alter the elementary requirement that the claimant allege *and prove* the substance of all essential elements in his case." A. Larson, 2B *The Law of Workmen's Compensation*, § 77.44, pp. 15-39 (1993) (emphasis added). This Court has also recognized this principle. *U.S. Industries* at 614 n.7.

The original LHWCA contained no burden of proof or evidentiary standards governing administrative outcomes. However, Congress did include several provisions that exemplified its remedial purpose, including a series

[7] Since inception, the LHWCA has anticipated that most claims will be resolved without dispute, as over 95% presently are, but permits employers to contest suspect claims. 33 U.S.C. § 914. Initial administrative adjudication procedures are set out at 33 U.S.C. § 919. Appellate procedures are set out at 33 U.S.C. § 921.

of presumptions governing claims, "in the absence of substantial evidence to the contrary." 33 U.S.C. § 920.

This Court held shortly after enactment that the statutory presumptions do not achieve the quality of affirmative evidence, and fall out of the case "once the employer has carried his burden" by demonstrating "substantial evidence to the contrary." *Del Vecchio v. Bowers,* 296 U.S. 280, 286 (1935). Accord, *U.S. Industries* at 616.

Justice Brennen's dissent in *U.S. Industries* captures the relationship of the LHWCA's presumptions to the Act's remedial purpose. "By its terms, and quite in contrast to the practice in judicial proceedings, § 20(a) requires the employer to take the initial steps to disprove his liability. This *preliminary shifting of the burden* to the employer exemplifies the 'humanitarian nature of the Act' . . ." 455 U.S. 617 (citations omitted) (emphasis added).

From the Act's inception this Court recognized that it was remedial in nature and that its provisions were to be construed liberally. *Baltimore & Philadelphia Steamboat Co. v. Norton,* 284 U.S. 408 (1932) ("[A]re deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results."); *Voris v. Eikel,* 346 U.S. 328, 333 (1953) ("The Act must be liberally construed in conformance within its purpose, and in a way which avoids harsh and incongruous results.").[8]

---

[8] To the Federal Petitioner, of course, these statements have evolved to a construction of the Act and its provisions that "should be construed liberally in favor of the employees or his dependents" regardless of the plain language of the Act. Br. at 25. Frequently this bias toward a liberal construction includes formulating a "remedial alternative" to the Act, as in this case, or endorsing a "recent trend" in workers' compensation law. But see, e.g., *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, (1980) and *Morrison-Knudsen Construction Co. v. Director, OWCP,* 461 U.S. 624 (1983), two opinions of this Court rejecting "remedial alternatives" and "recent trends" to the plain language of the LHWCA.

Over time the Act's benefit structure proved inadequate and its coverage provisions confusing. Despite these two flaws, or perhaps because of them, the Act's remedial purpose and humanitarian nature gave it an almost hallowed status before the courts. Judicial gloss abounded in *dicta.* Whenever some appellate courts found it necessary to strain for reasons to uphold compensation awards to injured workers, "all doubtful fact questions [are] to be resolved in favor of the injured employee . . ." *Young & Co. v. Shea,* 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied,* 395 U.S. 920 (1969); "When there is doubt, it should be resolved in favor of the injured employee or his dependent family." *Fidelity & Casualty Co. of New York v. Burris,* 59 F. 2d 1042 (D.C. Cir. 1932).

It is this pre-1972 judicial gloss, still fashionable today in some of the circuits, that forms the entire basis for the Federal Petitioner's allegation that a true doubt rule has existed since the inception of the Act.

A close reading of the pre-1972 case law, despite the Federal Petitioner's assertions to the contrary, clearly reveals that not one authority cited stands for the proposition that the Secretary of Labor has the statutory authority to administratively assign the burden of persuasion in close cases. Nor, until recently, did the DoL ever claim such authority.

C. The LHWCA Reforms of 1972 and 1984 Lend No Credence to the Alleged Rule

Congress addressed these statutory flaws by substantially overhauling the Act with the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576 ("the Amendments"). Further changes were enacted in 1984 in an effort to fine tune the 1972 Amendments.[9]

---

[9] The Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426.

The 1972 Amendments comprised a reticulated series of carefully balanced reforms to the Act. Benefits were increased, coverage was expanded landward of the *Jensen* line, and third party recovery obligations recast and clarified. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 261 (1977) ("Caputo").

Included amongst these reforms, and, in fact, absolutely necessitated by the other adjustments made to the Act, was an overhaul of the Act's antiquated dispute resolution process. Congress accomplished this overhaul by, *inter alia*, creating an "independent" internal adjudicative review process, the Benefits Review Board ("BRB"), 33 U.S.C. § 921(b), and assigning initial adjudicatory functions to Administrative Law Judges, vice deputy commissioners, under the administrative and policy making authority of the Department. 33 U.S.C. § 919(d). The BRB was then constituted by the Secretary to be independent of the newly created Office of Workers' Compensation Programs ("OWCP"), but still within the ambit of the DoL. The DoL publishes rules and regulations for the operation of the BRB (20 C.F.R. § 802 *et seq.*).

Congress felt compelled to take this action because it feared that the LHWCA "[Had] suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings[.]" H. Rept. 92-1441, p. 11, 92d Congress, 2d Sess.; S. Rept. 92-1125, p. 13-14. 92d Congress, 2d Sess. Consequently it realigned the Act with modern notions of fairness and due process in order to expunge the built in bias then rampant within the administration of the Act.

This was accomplished explicitly by applying the APA —with the most all inclusive possible proviso—to all claims adjudications conducted under the Act. Congress accomplished this by adding a new section, § 19(d), which reads in part "*Notwithstanding any other provisions of this Act*, any hearing held under this Act *shall* be conducted in accordance with the provisions of § 554 of Title 5 of the United States Code." 33 U.S.C. § 919(d). (emphasis added)

If Congress was ever going to modify the burden of proof requirement of the APA as it applied to LHWCA adjudications and assign the risk of non-persuasion to the employer upon evidentiary equipoise or in close cases, or grant this authority to the Secretary of Labor, this would have been the perfect opportunity. It clearly did not do so. Instead Congress removed any doubt as to the applicability of the APA to LHWCA adjudications, and thereby rendered meaningless all the pre-1972 court decisions relied upon by Petitioner to support its claim that the Act has long fostered a true doubt rule.

Congress did reaffirm the existing evidentiary informality principle found in § 23(a) by extending it to hearings conducted by the newly created BRB. Henceforth all LHWCA hearings "shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, *except as provided by this Act* [.]" 33 U.S.C. § 923(a). (emphasis added)

The informality principle results from the initial compromise of common law norms, as discussed above, and is a *quid pro quo* for the removal of compensation claims from the litigation arena. Thus formal legal rules of evidence are to be relaxed in administrative claims hearings. Professor Larson places the informality principle in proper perspective:

> "The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. On the other hand, as every lawyer knows, there is a point beyond which the sweeping aside of "technicalities" cannot go, since evidentiary and procedural rules usually have a core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." A. Larson, 2B, *The Law of Workmen's Compensation*, § 77A.10, p. 15-2 (1993).

Of course § 23(a)'s last proviso "except as provided by this Act" explicitly subsumes all LHWCA administrative hearings conducted with this section's attendant infor-

mality principle into § 19(d)'s express application of APA standards—"Notwithstanding any other provisions of the Act, any hearing . . . shall be conducted. . . ."

The provisos of § 19(d) and § 23(a) then, whether read independently or together, support only one conclusion; Congress intended to apply the APA, including the § 7(c) burden of proof standard, to any and all administrative hearings conducted under the Act. The Federal Petitioner's strained interpretation of these two sections can only come about by omitting the key proviso of § 23(a) and ignoring the plain meaning of both this section and § 19(d) and Congressional intent.

The 1972 Amendments did not disturb § 20, 33 U.S.C. § 920, presumptions and left this Court's *Del Vecchio v. Bowers*, opinion governing their use, as discussed above, intact.[10] Both House and Senate Reports also called on the Secretary of Labor to "take full advantage of the requirement of separating the functions under the statute to consider a complete reorganization . . ." S. Rept. 92-1125, p. 14; H. Rept. 92-1441, p. 11. This was later accomplished through the creation of the OWCP.

Congress' new scheme was designed especially to avoid a biased adjudicatory process through continued commingling of the administrative and adjudicatory functions within the DoL, and conflicts of interests between Department personnel, whether actual or apparent.[11]

Enactment of the 1972 reforms brought the Act's dispute resolution process into the modern era, on par with those of other federal labor laws. These reforms

---

[10] In fact Congress in 1984 expressly reaffirmed this Court's opinion in *U.S. Industries*, concerning the proper application of the § 20 presumptions in accordance with *Bowers*. Conf. Report to S. 38, H. Rept 98-1027, p. 33 (98th Congress, 2d Session); S. Rept. 98-81, p. 37 (98th Congress, 1st Session).

[11] Prior to 1972, legal contests between employers and claimants simply failed to measure up to modern notions of due process and fairness. Quasi judicial hearings were held by the administrative authority, the deputy commissioners, and the only review was to the federal courts.

upgraded what was a seldom utilized remedial statute administered in a haphazard fashion by a backwater agency to a model workers' compensation statute which is to be administered in an unbiased fashion by a transformed DoL.

D. The Judicial Response to the 1972 Reform Amendments Give No Credence to the "True Doubt Rule."

This Court subsequently recognized that the 1972 Amendments represented a sea change in the nature of the LHWCA. As noted by Justice Marshall in the Court's first case dealing with one of the principal reforms made —the landward expansion of coverage—the Amendments represented "the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it." *Caputo*, 432 U.S. 249, 261 (1977). Two terms later the Court noted the "new means of adjudicating compensation cases," another of the reforms made in 1972. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 n.11 (1979).

Each of the subsequent opinions of this Court has one common denominator. Despite dealing with many different issues, this Court has consistently rejected expansive arguments that rely on prior judicial gloss and/or Labor Department interpretations seeking "remedial alternatives" or endorsing "recent trends." See, e.g., *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 280 (1980) (The remedial purpose of the Act . . . "has insufficient force to overcome the plain language of the statute itself."); and *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 635 (1983) ("[A] comprehensive statute such as this Act is not to be judicially expanded because of 'recent trends.'")

This Court has held consistently that the words of the reformed Act mean exactly what they say. "The controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of [the] statute[] as written." *Cowart v. Nicklos*, 505 U.S. ——, slip opinion at 6 (1992); Theories or concepts that ap-

pear "nowhere in the Act" and that are "never mentioned by Congress during the legislative process" and that don't "comport with Congress' intent" have been unceremoniously rejected by the Court. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 322 (1983) (rejecting maritime but local defense). Cf. *Caputo*, (rejecting "point of rest" as jurisdictional limit of the 1972 Amendments.)

As noted above the true doubt rule appears nowhere in the Act, has never been mentioned by Congress, and does not comport with the express intent of Congress to incorporate the APA, and therefore must be construed accordingly. As Chief Justice Rehnquist admonished in one case concerning a particularly troublesome change made by Congress in 1972, "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.'" *Director, OWCP v. Rasmussen*, 440 U.S. 29, 47 (1979).[12]

As this Court could not rewrite Congress words then, neither can it do so now by reading a true doubt rule into the reformed Act. It simply is not found in the LHWCA/APA statutory scheme.

E. The Department of Labor Continues to Ignore the 1972 Amendments and Opinions of this Court

Despite the 1972 Amendments and the opinions of this Court issued since *Caputo*, the Department of Labor persists in taking litigating positions not reflected in the LHWCA or in the Department's published regulations. Like the two cases below, this causes considerable confusion in the circuits. See, e.g., *Ryan Walsh v. Trainer*, 601 F.2d 1306 (1979). *Maher* and *Greenwich Collieries* are only the latest such cases. This Court, too, has seen more than its fair share of DoL inspired litigating problems.

For example, the Department's propensity to take insupportable *ad hoc* litigating positions has led to recurring embarrassment before this Court. At least thrice since the 1972 Amendments, the Department has either flip-flopped positions between an appellate decision and Supreme Court review,[13] or advanced another "remedial alternative" like the cases below.[14]

Amici submit that these three opinions and the two cases now before the Court have one thing in common; all result from the continuing confusion within the Department generated by the conflict of interest at the Department's legal advisory level. The Department's legal advisor represents both the Director, OWCP and the BRB (20 CFR § 702.333; 20 CFR § 801.402). This, in turn, leads *Amici* to seriously question which party *de facto* sets DoL policy. Is it the Solicitor of Labor in conjunction with the BRB or is it the Director, OWCP represented by the Solicitor of Labor? The statutory interpretation of which client goes forward in litigation? Or, as in this case, is it the brand new interpretation of the Solicitor's third client, the Secretary of Labor, that goes forward? *Amici* suggest that this is the real problem behind this Court's concerns in *Caputo*, 256, n.11, and *Perini North River*, 303, n.10 and n.11, and that the Department only cured the problem superficially when it promulgated new regulations in the interval between these two opinions. Simply indicating in regulations the proper party for appellate concerns has not clarified the confused chain of command in the Department.

"Mistakes" and "altered positions" are one thing: usurpation of delegated legislative authority through unauthorized litigating positions is quite another. What is

---

[12] *Rasmussen* was subsequently overturned by § 9 of the 1984 Amendments to the Act, P.L. 98-426.

[13] Two flip-flops: *Morrison-Knudson* at 645 ("The Director has now switched sides. Of course, agencies often make mistakes and disavow prior positions. . .") ; *Cowart* (slip opinion at 6) ("[T]he Director of the OWCP and the Department of Labor have altered their position. . . .").

[14] *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 279 (1980), ("The notion that the plain language of the LHWCA might not mean what it says is thus a relatively recent development surfacing for the first time almost 50 years after its enactment.").

abundantly clear, moreover, is that Petitioner has not even bothered to consult with other agencies within the Department of Labor in its efforts to portray the longshoring industry as inherently hazardous and longshoreman as in need of special federal protection (Br. at 25). Petitioner relies on language in a 22 year old Senate Report that clearly is outdated. Had Petitioner checked with the expert authority available within its own Department, e.g., the Occupational Safety and Health Administration or the Bureau of Labor Statistics, it could have learned that longshoring does not even show up on the Department's target list of unsafe industries, and that the typical longshoreman in need of the department's protection now earns well over $50,000 annually, exclusive of pension, health and other fringe benefits.[15]

This Court should no longer condone the Department's state of confusion. Even at this late date, it still reigns. For example, attorneys with the Department of Labor now apparently understand that they cannot continue to rely on advancing the true doubt rule "on behalf of the

[15] See e.g., the most recent annual survey by the Bureau of Labor Statistics of occupational injuries and illnesses, *"Workplace Injuries and Illnesses in 1992"* dated December 15, 1993. Longshoring doesn't show up in the appendix to this report listing the incidence rate of the 40 most offending industries. To be sure Longshoring does make the top 40 in days away from work rates, but this is not unexpected given the fact that modern marine terminals produce almost no opportunity for light duty.

Had the Federal Petitioner checked OWCP's own statistics, it would have been informed that LHWCA lost time injuries and claims are down steeply—approximately 50%—over the past 10 years, despite record tonnage going through marine terminals. *Annual Report on the Administration of the LHWCA for Fiscal Year 1992*, Employment Standards Administration, U.S.Dol (1993). In part this is do to industry-labor safety programs, and collectively bargained drug and alcohol testing programs.

As for longshore wages, the average annual wages on the Pacific coast are as follows: 90% of longshoreman earn in excess of $60,000; 94% of clerks earn $86,000; and 92% of foremen earn $117,000. This is *exclusive* of pension, health, milage, non-taxable meals, etc. *Annual Report, Pacific Maritime Association* (1993). Atlantic and Gulf coast wage scales are commensurate.

Director, OWCP" when proclaiming this "longstanding" rule of administrative law, given the fact that the OWCP did not even exist unitl 1972. So with the latest Brief on the merits the rule is now attributed to a longstanding "determination by the Secretary" (Br. at 15).

II. THE FEDERAL PETITIONER IS ATTEMPTING TO RENDER THE APA MEANINGLESS

A. Despite Petitioner's Contention to the Contrary, the 1972 LHWCA Reforms Expressly Incorporate § 7(c) of the APA

As noted at I-C, *supra*, one of the fundamental reforms made to the LHWCA by Congress in 1972 was the clear language of § 19(d), 33 U.S.C. § 919(d) expressly incorporating 5 U.S.C. § 554 into the LHWCA, and thus adopting the APA § 7(c) evidentiary and burden of proof standards set forth at 5 U.S.C. § 556(d), for all administrative hearings.

Under the reformed procedures, all disputed claims, whether at the ALJ level or the BRB level, are to be resolved expressly and explicitly in accordance with the APA. The published regulations promulgated almost contemporaneously by the Secretary of Labor faithfully reflect this fact (20 C.F.R. § 702.332).[16]

Despite both the plain language of the LHWCA and the Department's regulations, the Federal Petitioner, which has heretofore acknowledged that the APA "generally" applies to LHWCA claims adjudications (Pet. for Cert. at 16) now argues that "in any event, whatever restrictions § 7(c) imposes do not apply to claims ad-

[16] 20 C.F.R. § 702.332 reads as follows: "Formal hearings; how conducted. Formal hearings shall be conducted by the administrative law judge assigned the case by the Office of the Chief Administrative Law Judge *in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 554 et seq.* All hearings shall be transcribed." (emphasis added)

While BRB regulations do not contain a similar provision, the BRB acknowledges the statutory role of the APA. See *Longshore Desk Book*, APA 1-5 (1987).

judications under the LHWCA and the BLBA." Br. at 17, repeated at 34 and 43. Petitioners claim that the exculpatory sentence of APA § 7(c), "*except as otherwise provided by statute,* the proponent of a rule has the burden of proof [.]" should be read to "preserve the general flexibility concerning evidentiary and procedural rules prescribed by § 23(a) of the LHWCA . . ." Br. at 46.

Petitioner's argument is disingenuous. The conclusion, that the LHWCA "otherwise provides [the true doubt rule] by statute" can only be reached by reading out of the LHWCA the two key phrases that incorporate the APA. Besides ignoring the all inclusive language of § 19(d) "Notwithstanding any other provisions of this Act, any hearing . . . shall be conducted in accordance with the provisions of § 554 of Title 5 . . . ," the Petitioners also omit the critical proviso, "*except as provided by this Act.*" found in LHWCA § 23(a), 33 U.S.C. § 923(a), which, as noted *supra* at I-C, governs the scope of the rules of evidence and procedure during informal hearings.

Recognizing that this last omission is the linchpin of its LHWCA statutory construction, the Federal Petitioner has taken every opportunity on brief to write the offending proviso from the Act by failing to quote the entire § 23(a). (See, e.g., Brief at 18, 24, 43, and at 45-46).[17] Although this last misquote acknowledges the omission in the following paragraph (Br. at 46), Petitioner immediately attempts to confuse the issue by deflecting the grammatical shortcomings within the brief, and suggesting that any argument employing all the words of the section is circular.

As noted at I-C, *supra,* however, Congress in 1972 included the § 23(a) proviso in its mix of reforms to the

[17] Burying unfavorable statutory language in ellipsis is one thing, omission quite another. "The Bluebook" specifies certain signals when omissions occur at the end of a quoted sentence. *The Bluebook,* § 5.3 at p. 45. Under the circumstances, Petitioners' repeated omission is obviously not unintentional.

LHWCA adjudicatory process, undoubtedly agreeing with Professor Larson: "[W]hen [a] rule whose relaxation is in question is more than a merely formal requirement and touches substantial rights of fair play, no relaxation is justified[.]" [A. Larson, 2B, *The Law of Workmens' Compensation,* § 77A, p. 15-1 (1993)].

Amici submit that the question of assigning the burden of persuasion, which can have the effect of also setting an evidentiary standard higher than the APA norm, essentially two sides of the same coin, does indeed touch substantial rights of fair play, even in the sense of procedural fairness under the Due Process Clause. See *Concrete Pipe & Products of California, Inc.* (slip opinion at 23). The drafters of the APA specifically designed this statute to avoid administrative assignments that raise these very concerns.

The text of the LHWCA/APA statutory scheme is quite clear. By its very terms § 23(a) expressly acknowledges the dominant role of § 19(d) of the Act, 33 U.S.C. § 919(d), that in turn expressly incorporates the APA, including the § 7(c) burden of proof and evidentiary standards, set out at 5 U.S.C. § 556(d), as governing LHWCA claims adjudications.[18] Only a construction of the Act that omits the first and ignores the second of these two provisos permits Petitioner's contention that LHWCA adjudications can escape § 7(c) standards.

Had Congress chosen to modify the application of the APA to the LHWCA in 1972, it certainly knew how to do so. The Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.,* enacted two years prior to the LHWCA but originating in the same Committees, con-

[18] Section 7(c) of the APA, 5 U.S.C. § 556(d) reads in part as follows: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

tains specific language eliminating or modifying APA standards. (See, e.g., 29 U.S.C. § 655 and § 659)

B. Section 7(c) of the APA Places the Ultimate Burden of Persuasion on LHWCA Claimants Consistent With This Court's Reasoning in *Transportation Management* and *Steadman*

In the interests of attempting to simplify the Federal Petitioner's latest construction of § 7(c) of the APA made on brief, *Amici* believe that the following accurately portrays Petitioner's logic.

Petitioner admits that LHWCA "does not specify which party should bear the ultimate risk of non-persuasion . . ." i.e., the burden of persuasion (Br. at 15, 23). Petitioner then argues that the Secretary's authority to assign the risk of non-persuasion falls within the scope of the "except as otherwise provided by *statute*" exculpatory proviso of APA § 7(c), thereby escaping § 7(c)'s general rule, because "statute" should be read to include "presumably regulat[ions] . . . ," Br. at 35, and "administrative schemes" (Br. at 47). Petitioner, which has heretofore accepted that the APA "generally" applies to LHWCA claims determinations, as noted above, then argues that § 7(c)'s general rule only assigns one component of the burden of proof to a claimant, i.e., the burden of production, Br. at 34-35, citing a footnote in this Court's *NLRB v. Transportation Management Corp.* opinion, discussed below. Therefore, the reasoning goes, the Secretary of Labor, is unhampered by *any* statutory authority and is completely free to administratively assign the second component of the burden of proof, the risk of non-persuasion, to the defending employer.

Finally, in case the logic of this argument does not persuade the Court, Petitioner's fall-back position cuts to the heart of the matter. "[I]n any event, whatever restrictions § 7(c) imposes do not apply to claims adjudications under the LHWCA and the BLBA" (Br. at 17, 43). The event in question being whether or not the burden of proof specified by § 7(c) includes both parts of what traditionally is thought of as the burden of proof.

Amici note that by this same logic the Secretary would also be permitted to assign the burden of production and set evidentiary standards higher or, for that matter, lower, than the norms established by the APA. The Secretary would in effect become a legislative authority unto itself. Petitioner's sophistic logic is demonstrably short of what Congress had in mind when it incorporated APA § 7(c) into the LHWCA. It also flies in the face of what Congress intended with passage of the APA in 1946 and subsequent opinions of this Court fleshing out the requirements of § 7(c). The plain meaning of APA § 7(c) is, then, the crux of the only real issue before the Court.

As just noted, Petitioner bases a goodly portion of its argument on footnote 7 of this Court's opinion in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404 (1983). Notably, however, Petitioner's fall-back position is completely at odds with Petitioner's own reading of this footnote. Petitioner completely misses the significance of *Transportation Management*. This case, as acknowledged by the then Federal Petitioner, involved the question of which party bore the ultimate burden of persuasion set by statute, The National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, after an affirmative defense had been raised. The Federal Petitioner in this case, the National Labor Relations Board, acknowledged on brief that the provisions of the Labor Act placed the ultimate burden of persuasion on the Board's general counsel and, being "more specific provision[s of another Act] . . . govern" over the requirements of § 7(c) of the APA. *Transportation Management*, Brief of Federal Petitioner, p. 36. This Court agreed with the Federal Petitioner's analysis and held accordingly.

Thus the issue in *Transportation Management*, while concerned with the proper assignment of the burden of persuasion, dealt with a statutory assignment *outside* the mandate of the APA, not an administrative assignment that clearly falls *within* APA §7(c). Consequently, the

most that APA § 7(c) could require in a situation where another statute sets its own burden of persuasion, is the burden of production. The Court's footnote acknowledged as much and no more and should not be read, as Petitioner has done, to place the assignment of the burden of persuasion in APA governed adjudications outside the APA.

Two terms prior to *Transportation Management* this Court did have occasion to examine § 7(c) of the APA, although the issue before that Court did not concern the assignment of the burden of proof, but rather the evidentiary standard of proof required before a proponent of an order could prevail. In *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 102 (1981), this Court held that the "traditional" preponderance of evidence standard is the standard of proof necessary to satisfy § 7(c)'s burden of proof requirement.

In order to prevail in an APA governed adjudication then, the party who has the burden of persuasion must produce evidence that is slightly superior to that produced by the other party. Although all parties now before this Court apparently agree on this point, it certainly cannot be said that a claimant who prevails under the true doubt rule has proffered evidence superior to that offered by the contesting employer. *Amici* suggest that *Steadman* is the proper answer to the true doubt rule for this reason, and for a slightly different reason as well. *Steadman*'s preponderance standard, the "most common standard in the civil law," *Concrete Pipe & Products of California, Inc.* (slip opinion at 18), certainly reflects the intent of the drafters of the APA to incorporate the traditional and most common civil law standards throughout all of § 7(c).

It is clear from the language of § 7(c), which states in part, "Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof*[]" that, by its express terms, it places the entire burden of proof on a LHWCA claimant. This choice, like the evidentiary preponderance standard at issue in *Steadman*, is

also the "traditional" and "most common" placement found at civil law.

Contemporary authorities certainly thought this to be so. Section 7(c) "states the customary rule that the proponent of a rule or order shall have the burden of proof." *Attorney General's Manual on the Administrative Procedure Act*, Appendix, p-133 (1947). "The provision relating to the burden of proof is the standard rule." Senate Comparative Print, p. 15 June 1945 (Senate Document No. 248, 79th Congress, 2nd session, p. 31 (1946)).

The language of § 7(c) does not distinguish between the two components of the burden of proof. Traditionally, at common law, the burden of proof consists of two parts, the burden of production, i.e., going forward, and the burden of persuasion, i.e., risk of non-persuasion. While the former burden is said to shift throughout the adjudication, the latter burden does not and is always allocated to the party initiating an action. However exceptions to the initial allocation rule are recognized and include certain presumptions, affirmative defenses and similar legal devices that *temporarily* shift the burden of persuasion to the contesting party.

But the ultimate burden of persuasion always remains with the initiating party, as it did in both *Transportation Management* and *Steadman*. Section 7(c)'s burden of proof requirements must reflect this traditional and customary placement of the burden of persuasion, just as this Court found that the section's evidentiary standard reflected the traditional preponderance standard.

This result is further compelled by the intent of the APA to preserve common law rights. "This subchapter . . . do[es] not limit or repeal additional requirements imposed by statute *or otherwise recognized by law*." 5 U.S.C. § 559 (emphasis added). One commentator points out that this language and its legislative history "[S]pecifically provides that the APA shall not be interpreted to limit or repeal common law rights." Davis, *Administrative Law of the Eighties*, Supplement to Administrative Law Treatise, §§ 6:35-6:39, p. 219 (1989).

Given the clear language of § 7(c) and the intent of its drafters, there is no reason whatsoever for this Court to depart from the traditional and customary placement of the burden of persuasion for administrative adjudications governed by the APA. The precise reasoning that led the *Steadman* Court to conclude that the § 7(c) evidentiary standard is the traditional standard compels the same conclusion in *Maher* and *Greenwich Collieries*. The § 7(c) placement of the burden of proof, including the burden of persuasion, can only be the traditional and customary one.

Congress has not mandated a different standard for LHWCA claims adjudications despite the best efforts of the Secretary of Labor to prove otherwise. The Federal Petitioner is well aware that Congress, unlike an agency subject to the APA, may assign the burden of persuasion, just as it might "mandate[] a more stringent evidentiary standard than preponderance," *Steadman* (Brief for Federal Respondent at 41).

Indeed, Congress has often done so. For example, eight years after the 1972 LHWCA Reform Amendments, Congress enacted another massive rewrite of an existing benefits law, the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, completely overhauling ERISA, Title IV as it applied to multiemployer pension plans. Congress assigned the burden of persuasion in arbitration proceedings to an employer contesting an assessment of withdrawal liability by a pension plan. *Concrete Pipe & Products*, slip opinion at 26, 27.

Any placement of the burden of persuasion other than the traditional placement will eventually erode both *Steadman* and the footnote in *Transportation Management*.

Amici submit that Petitioner's newest fall-back argument made on brief, i.e., that § 7(c) does not govern LHWCA claims "in any event" (Br. at 43), is a tacit acknowledgement that Congress clearly meant to include the burden of persuasion, along with the burden of production, within the scope of § 7(c). As a practical matter, Petitioner has acknowledged that any interpretation of § 7(c) that retains the burden of production within the ambit of the APA, but splits out the burden of persuasion for arbitrary administrative assignment, is ludicrous.

C. The Assignment of the Burden of Persuasion by the DoL Supersedes APA Authority

Section 12 of the APA states clearly that "Subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly" (5 U.S.C. § 559).

No reasonable argument can be made that any LHWCA legislation enacted by Congress has expressly superseded the APA's burden of proof requirements. Certainly neither the 1972 nor the 1984 Amendments override *any* APA requirement, including § 7(c)'s assignment of the burden of proof. As noted at I-C, *supra*, the 1972 Amendments expressly incorporated the APA without any modifications. And as noted at n.10, *supra*, the 1984 Amendments expressly reaffirmed this Court's *U.S. Industries* opinion governing the scope of the LHWCA statutory presumptions without any recognition whatsoever of this alleged rule.

Petitioner's administrative construction of the rule contradicts the APA statutory scheme. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). As such the Department of Labor has exceeded its adjudicatory authority granted by the APA, and the rule violates § 12 of that Act.

Nor can any reasonable argument be made permitting the Federal Petitioner to ignore other substantive provisions of the APA. In addition to superseding § 7(c) of the APA, the Secretary's actions have overlooked the following APA provisions; the publication requirement, 5 U.S.C. § 552; the requirement that ALJ's adhere to an Agency's published rules and statutory powers, 5 U.S.C. § 556(c); and the requirement that a *substantive*

"rule" of an agency having "future effect designed to . . . prescribe law or policy" [5 U.S.C. 551(4)] be subject to notice and comment rulemaking (5 U.S.C. § 553).[19]

Amici suggest that, on the question of supersedure of the APA, the answer is evident. The Federal Petitioner is not only exceeding the adjudicative norms expressly required by the APA, Petitioner is not even attempting to conform to the minimum APA regulatory standards proscribed by Congress. Petitioner's true doubt rule simply ignores the APA.

III. THE ALLEGED "TRUE DOUBT RULE" IS A LITIGATING POSITION ADVANCED "ON BEHALF OF THE SECRETARY" AND DUE NO DEFERENCE BY THIS COURT UNDER THE CIRCUMSTANCES

As noted above, the Federal Petitioner readily admits that the LHWCA "does not specify which party should bear the ultimate risk of non-persuasion[.]" (Br. at 15, 23). Moreover, the Petitioner's complete dearth of regulations on the subject is a constructive admission that the LHWCA/APA statutory scheme does not, in fact, delegate any authority to the Labor Department to assign the burden of persuasion administratively.

Not surprisingly then, Petitioner's claim of the right to assign the burden has been advanced solely in litigation. Petitioner's arguments made on brief, certainly those concerning the proper LHWCA/APA statutory construction, are no more than *post hoc* rationalizations for the true

[19] See, e.g., the *Attorney General's Manual on the Administrative Procedure Act*, p. 13 (1947), distinguishing between a "rule" and an "order" under the APA. ("The definition of rule is not limited to substantive rules, but embraces interpretative, organizational and procedural rules as well" and rules "[M]ust be of *future effect* . . ."). Substantive rules are further described in the *Manual* to be "rules issued pursuant to statutory authority to implement statutory policy." p. 13, footnote 5. In this respect, at least, the Federal Petitioner is acting consistently with the APA. Amici hazard to guess that, to the Labor Department's way of thinking, the true doubt "rule" is not subject to APA rulemaking requirements, even though it clearly has future effect, because it is *de facto* without any LHWCA statutory basis.

doubt rule. Such litigating positions are frowned upon by this Court and are "not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in a reviewing court." *Martin v. OSHRC*, —— U.S. ——, 111 S.Ct. 1171 (1991) (slip opinion at 11).

This Court has recognized the policy making authority of the Director, OWCP and has held that the Director's "consistent practice" is "entitled to deference." *Morrison-Knudson*, 461 U.S. 624, at 635. However, this Court has held repeatedly that "no deference is due to agency interpretations at odds with the plain language of the statute itself." *John Hancock Mutual Life Ins. Co. v. Harris Trust*, —— U.S. —— (1993) (slip opinion at 23) (citation omitted). This Court has also consistently held that "administrative constructions that are contrary to clear Congressional intent" must be rejected, *Chevron, USA., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9) (1984) (citations omitted), and that courts "[S]hould not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms." *Cowart*, slip opinion at 6.

Despite Petitioner's best efforts at amassing its arguments, whether individually or collectively they can only be construed to contradict the LHWCA/APA statutory scheme. The basis for judicial deference—reasonable and in keeping with statutory authority—is, then, missing.

CONCLUSION

Contrary to the Federal Petitioner's assertions on brief and its long line of cited cases, the alleged true doubt rules does not have a lengthy pedigree. Rather it has a short but tortured and completely manufactured history. It is pure legal sophistry.

The rule is in effect a "remedial alternative" to the adjudication procedures proscribed by the LHWCA/APA and to controlling LHWCA opinions of this Court. Taking Judge Easterbrook's rhetorical question one step further, could it be that the Federal Petitioner is attempt-

ing not only to "override the judgment of Congress[.]" but also controlling opinions of this Court? *Freeman United Coal Mining Co. v. Director, OWCP*, 999 F.2d 291 (7th Cir. 1993, statement of Easterbrook, J.). *Amici* submit that the answer is self evident.

The APA, which is essentially a statutory roadmap through the 5th Amendment's Due Process clause, has kept regulatory conflict to a minimum since its enactment almost 50 years ago, principally because it reflects elementary notions of fairness and common legal norms. Heretofore, there has simply been no room for "rules" like the alleged true doubt rule within the APA's proscriptions. Should the rule and the Federal Petitioner's outright attempt to supersede the APA now be upheld, the APA may well be on its way to being cast adrift.

Given the Federal Petitioner's apparent desire to escape the restrictions of the APA, the yawning maw of government feared by this court in *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 167 (1962), will be open wide unless the two decisions below are affirmed.

Amici respectfully urge this Court then to affirm both *Maher Terminals* and *Greenwich Collieries*.

Respectfully submitted,

CHARLES T. CARROLL, JR.*
THOMAS D. WILCOX
THOMAS D. WILCOX, P.C.
2011 Eye Street, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005

FRANKLIN W. LOSEY
General Counsel
SHIPBUILDERS COUNCIL OF AMERICA
4301 N. Fairfax Dr.
Arlington, VA 22203
(703) 276-1700

* Counsel of Record

No. 93-744

Supreme Court, U.S.
FILED
APR 1 1994

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

MAHER TERMINALS, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

HAROLD P. QUINN, JR.
(Counsel of Record)
National Coal Association
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2652

Counsel for Amicus Curaie National Coal Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

A. THE TRUE DOUBT RULE IS NOT CONSISTENT WITH THIS COURT'S DECISION IN *MULLINS COAL* 6

B. THE TRUE DOUBT RULE IS NOT EMBODIED IN DOL'S REGULATIONS 8

C. EVEN THE COURTS APPROVING THE TRUE DOUBT RULE DO NOT AGREE WITH DOL'S SCHEME 11

D. DOL'S TRUE DOUBT RULE IS NEITHER WORKABLE NOR FAIR 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

Blackburn v. Director, Office of Workers' Compensation Programs, 14 Black Lung Rep. (MB) 3-475 (ALJ 1990) 15

Bohr v. Director, Office of Workers' Compensation Programs, 14 Black Lung Rep. (MB) 3-476 (ALJ 1990) 15

Charlton v. F.T.C., 543 F.2d 903 (D.C. Cir. 1976) 16

Compton v. Inland Steel Coal Co., 933 F.2d 477 (7th Cir. 1991) 10

Cook v. Consolidation Coal Co., 13 Black Lung Rep. (MB) 3-601 (ALJ 1990) 15

DiRienzo v. Director, Office of Workers' Compensation Programs, 14 Black Lung Rep. (MB) 3-849 (ALJ 1991) 14

Fowler v. Director, Office of Workers' Compensation Programs, 13 Black Lung Rep. (MB) 3-389 (ALJ 1989) 14

Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 10, 1993) (No. 93-935) 11, 12

Gasperetti v. Director, Office of Workers' Compensation Programs, 16 Black Lung Rep. (MB) 3-956 (ALJ 1992) 15

Gilliam v. S. G. Coal Co., Inc., 15 Black Lung Rep. (MB) 3-164 (ALJ 1991) 15

Greer v. Director, Office of Workers' Compensation Programs, 940 F.2d 88 (4th Cir. 1991) 12

TABLE OF AUTHORITIES – Continued

Page

Griffiths v. B-D Mining Co., 16 Black Lung Rep. (MB) 3-673 (ALJ 1992) 14

Grizzle v. Pickands Mather & Co., 994 F.2d 1093 (4th Cir. 1993) 12

Guyer v. Director, Office of Workers' Compensation Programs, 3 Black Lung Rep. 3-79 (ALJ 1981) 14

Hart v. Peabody Coal Co., 3 Black Lung Rep. (MB) 3-21 (ALJ 1981) 14

Honneycutt v. Triple B. Corp., 13 Black Lung Rep. (MB) 3-746 (ALJ 1990) 15

Jones v. Alabama By-Products, 4 Black Lung Rep. (MB) 3-75 (ALJ 1982) 15

Kennedy v. Shannon Pocahontas Mining Co., 16 Black Lung Rep. (MB) 3-942 (ALJ 1992) 14

Matthews v. Quinland Coals, Inc., 14 Black Lung Rep. (MB) 3-117 (ALJ 1990) 14

McKeehan v. Director, Office of Workers' Compensation Programs, 14 Black Lung Rep. 3-524 (ALJ 1990) 14

McLone v. Maiden Mining, Inc., 16 Black Lung Rep. (MB) 3-717 (ALJ 1992) 14

Mobile J., & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910) 12

Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983) 17

Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987) 7, 8, 11, 12

TABLE OF AUTHORITIES – Continued

Page

Pahira v. Blaschak Coal Co., 13 Black Lung Rep. (MB) 3-491 (ALJ 1990) 14

Pauley v. BethEnergy Mines, Inc., 111 S. Ct. 2524 (1991) (Nos. 89-1714; 90-113 and 90-114) 3

Pepco v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980) 17

Poff v. Westmoreland Coal Co., 16 Black Lung Rep. (MB) 3-53 (ALJ 1991) 15

Roberts v. Blue Diamond Coal Co., 13 Black Lung Rep. (MB) 3-327 (ALJ 1989) 15

Sanson v. Director, Office of Workers' Compensation Programs, 16 Black Lung Rep. (MB) 3-183 (ALJ 1992) 14

Shaff v. U.S. Steel Mining Co., 16 Black Lung Rep.. (MB) 3-612 (ALJ 1992) 15

Skukan v. Consolidation Coal Co., 993 F.2d 1228 (6th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 17, 1993) (No. 93-964) 11, 12

Smith v. Peabody Coal Co., 16 Black Lung Rep. (MB) 3-622 (ALJ 1992) 14

Sutherland v. Clinchfield Coal Co., 14 Black Lung Rep. (MB) 3-862 (ALJ 1991) 14

Victor v. Nebraska, 62 U.S.L.W. 4179 (U.S. March 22, 1994) (No. 92-8894) 17

STATUTES AND REGULATIONS:

Administrative Procedure Act, as amended, 5 U.S.C. §§ 551-559, 701-706 (1988) 5

Section 7(c), 5 U.S.C. § 556(d) (1988) 7

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. § 4121 (1988) 3

26 U.S.C. § 4121(a) (1988) 3

26 U.S.C. § 4121(b) (1988) 3

26 U.S.C. § 9501 (1988)

26 U.S.C. § 9501(a)(2) (1988) 3

26 U.S.C. § 9501(c) (1988) 3

26 U.S.C. § 9501(d)(1)(B) (1988) 3

26 U.S.C. § 9501(d)(2) (1988) 3

26 U.S.C. § 9501(d)(4) (1988) 3

26 U.S.C. § 9501(d)(5) (1988) 3

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988) 2

Sections 422-23, 30 U.S.C. §§ 932-33 (1988) 2

Section 424, 30 U.S.C. § 934 (1988) 3

Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-110, 95 Stat. 1635 (1981) 10

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 312 (1986) 4

Black Lung Program Regulations

20 C.F.R. Part 718 (1993) 10, 13, 14

20 C.F.R. § 718.3(c) (1993) 10

20 C.F.R. §§ 718.202-718.205 (1993) 10

20 C.F.R. § 718.202 (1993) 16

TABLE OF AUTHORITIES – Continued

Page

20 C.F.R. § 718.304 (1993) 14

20 C.F.R. § 718.307(b) (1993) 10

20 C.F.R. § 718.403 (1993) 10, 11

20 C.F.R. Part 727 (1993) 13

20 C.F.R. § 727.203 (1993) 6

20 C.F.R. § 727.203(a)(1) (1993) 11, 12

20 C.F.R. § 727.203(b)(4) (1993) 11, 12

MISCELLANEOUS:

Black Lung Benefits and Revenue Amendments of 1981: Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources on S. 1922, 97th Cong., 1st Sess. (1981) 9

Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 1st Sess. (1981) 8

House Comm. on Ways and Means, *Report and Recommendations of the Subcomm. on Oversight on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. (1981) 9

Comptroller General of the United States, *Report to the Congress of the United States, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability*, HRD 80-81 (July 28, 1980) 9

U. S. Dept of Labor, Employment Standards Admin., *OWCP Annual Report to Congress FY 1992* (1993) 3, 9, 14

TABLE OF AUTHORITIES – Continued

Page

Facsimile from James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dept of Labor, Washington, D.C. (March 22, 1994) 4

A. Larson, *The Law of Workmens' Compensation* (1993) 5

Brief for the Federal Respondent, *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987) (No. 86-327) 7

Brief of the National Coal Association as Amicus Curiae in Support of Petitioners, *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991) (Nos. 89-1714, 90-113 and 90-114) 3

No. 93-744

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

MAHER TERMINALS, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This Court has granted certiorari to consider the decision of the Third Circuit Court of Appeals declaring invalid a "true doubt" rule advocated by the Department

of Labor ("DOL") to allow administrative law judges ("ALJs") to find facts that are not supported by the weight of the evidence. The National Coal Association ("NCA") and its members believe that the lower court was correct in striking down the "true doubt" rule and submit this brief in support of the respondents.

INTEREST OF AMICUS[1]

NCA is a trade association representing coal mine operators who produce sixty-five percent of the nation's coal. NCA's membership includes operating coal mining companies of all sizes, as well as coal brokers, equipment suppliers, coal transporters, consultants, electric utilities and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, in two ways: (1) as individual coal mine operator defendants,[2] 30 U.S.C. §§ 932-933; or (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund

[1] Pursuant to Rule 37.3, written consent form counsel of record for all parties to this proceeding are being filed with the Clerk of this Court with this Brief.

[2] Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

("Trust Fund"), 26 U.S.C. § 4121. Revenues collected for the Trust Fund are used to pay compensation awards in cases in which the miner's employment ended before January 1, 1970, or where an individual responsible coal mine operator cannot be identified or is uninsured. 30 U.S.C. § 934, 26 U.S.C. § 9501(d)(2), 9501(d)(1)(B). The Trust Fund also pays all administrative expenses of the Departments of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. § 9501(a)(2), 9501(d)(5). If the Trust Fund is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which must be repaid with interest. 26 U.S.C. § 9501(c), (d)(4).

The tax paid by coal producers into the Trust Fund, augmented by two tax increases, currently is set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal. 26 U.S.C. § 4121(a), (b). As of 1990, the Trust Fund had collected over $5.66 billion in tonnage taxes from coal producers but had paid out over $8.64 billion in compensation.[3] In order to meet the shortfall between compensation levels and Trust Fund revenues, by September 1993, the Trust Fund owed the U.S. Treasury more than $3.6 billion.[4] To relieve pressure on the Trust Fund, Congress passed a five-year moratorium on

[3] Brief of the National Coal Association as Amicus Curiae in Support of Petitioners at 4, *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991) (Nos. 89-1714, 90-113 and 90-114).

[4] U. S. Dept of Labor, Employment Standards Admin., *OWCP Annual Report to Congress FY 1992* 17 (1993) (*"1992 Annual Report"*).

interest accruals on the indebtedness of the Trust Fund in 1985. The moratorium ended September 30, 1990.[5] The interest on the debt is again accruing. In fiscal year 1992, the additional interest on the debt was $366,615,681.18.[6]

From time to time, NCA represents the interests of its members in litigation of importance to the mining industry. The matters presented here to this Court are of particular importance. In the early 1980s, NCA, together with all other groups having an interest in preserving a viable black lung compensation program, worked for over two years to avert impending financial collapse of the program. The products of this effort were the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-110, 95 Stat. 1635 (1981).

Today, DOL's active advocacy of a "true doubt" burden-shifting rule, applicable to all entitlement facts that need to be decided in black lung claims, violates both the letter and the spirit of the 1981 legislative effort. The court below was correct in restraining DOL's departure from the 1981 agreement. This Court should do the same.

SUMMARY OF ARGUMENT

The traditional standard of proof in civil litigation is the fair preponderance of the evidence. DOL asks this

[5] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (1986).

[6] Facsimile from James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, Washington, D.C. (March 22, 1994).

Court to permit ALJs to depart from this traditional standard of proof. DOL requests the Court to defer to its enactment of what is, in effect, a standard that requires the party defending a black lung claim to prove a claimant's non-entitlement by clear and convincing evidence or proof beyond a doubt.

DOL's justification for this departure is not readily identifiable. It does not rest on the plain language of the statute. The Black Lung Act contains no "true doubt" rule or any facsimile of it. It does not rest on a fair reading of DOL's regulations. Like the Act itself, DOL's regulations contain no "true doubt" rule. Although DOL's rules showcase the remedial intent of the Act and provide that ALJs "shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure," DOL's regulations do not exempt ALJs from applying the traditional notions of proof. Indeed, "[n]o amount of informality can alter the elementary requirement that the claimant allege and prove the substance of all essential elements in his case." A. Larson, 2B *The Law of Workmens' Compensation*, § 77A.44 (1993). Finally, DOL's justification for the rule does not rest on a fair or natural reading of the Administrative Procedure Act ("APA"), for it is well-established that under the APA, the party seeking a rule or order bears the burden of proving its case by a preponderance of the evidence.

Similarly, DOL's advocacy of a "true doubt" rule finds no justification in this Court's case law. These are not the types of cases in which this Court has upheld allocating the risk of error in other than roughly equal fashion. A black lung claimant's interest in securing benefits is substantial; but interests equally as substantial are

customarily adjudicated in civil proceedings under a preponderance of the evidence standard. The reason for this is plain. The preponderance standard insures that an adjudication rests on the most likely and probable view of the facts.

The scheme DOL advocates invites error in the administrative process and it is fundamentally unfair.

ARGUMENT

A. THE TRUE DOUBT RULE IS NOT CONSISTENT WITH THIS COURT'S DECISION IN *MULLINS COAL*

Seven years ago, DOL and several coal operators petitioned this Court for relief from a decision by the U.S. Court of Appeals for the Fourth Circuit holding that a fact was proved merely by the presence of a single item of evidence favorable to a black lung claimant. At issue was a powerful "interim presumption" found in the Black Lung Benefits Act and DOL's regulations that presumed a claimant's entitlement to benefits when the evidence "established" certain specified "invocation facts." The party opposing entitlement could rebut the presumption by proving the ultimate facts – that the miner was working or able to work, that the miner did not have pneumoconiosis, or that he or she was not totally disabled due to the disease. 20 C.F.R. § 727.203 (1993).

At that time, DOL argued that it was its longstanding practice to require black lung claimants to establish invocation facts by a preponderance of the evidence. Brief for

the Federal Respondent at 14-15, 18, 36, *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987). Similarly, according to DOL, the party opposing entitlement met its "parallel obligation" to "establish" its case "only by proving [a rebuttal fact] by a preponderance of the evidence," a view uniformly adopted by the courts of appeals at DOL's urging. *Id.* at 19 n.17. Hundreds of thousands of black lung claims had been adjudicated in that manner and, according to DOL, its regulations required such a practice. DOL also argued that requiring claimant to "establish" basic entitlement facts by a preponderance was in accord with the APA, adding further evidence of the reasonableness of its position. *Id.* at 15-16. 34.

The industry petitioners and NCA agreed with DOL on these points, and argued to the Court that the "single-item invocation rule" was inconsistent with agency practice, historic DOL interpretation, and the APA's requirement in section 7(c). That requirement states that the "proponent" of any agency rule bear the burden of proof which must "be . . . supported by and in accordance with the reliable, probative, and substantial evidence." It also states that a party is entitled to cross-examination as may be required "for a full and true disclosure of the facts."

This Court agreed. In *Mullins Coal*, the Court deferred to DOL's interpretation of its regulation and held that in order to "establish" an invocation fact, claimant must prove that fact by a preponderance of the evidence. *Mullins Coal*, 484 U.S. at 148-49, 159, 161 n.35.

In *Mullins Coal*, however, DOL argued that there was an "exception" to the APA's preponderance rule – the

"true doubt" rule. Under the "true doubt" rule, a preponderance does not mean a preponderance. It means, hypothetically, evidence that is equally probative but contradictory. According to DOL, where the claimant (but not the party opposing entitlement) bears the burden of proving a fact, a tie in the proof is good enough to "establish" that fact. This exception was not addressed by the Court in *Mullins Coal*, because it was not applied in the cases before the Court and was only rarely applied generally.[7]

Now DOL asks this Court to hold that the exception is the rule not only for cases subject to the interim presumption, but for all cases.

B. THE TRUE DOUBT RULE IS NOT EMBODIED IN DOL'S REGULATIONS

Since the inception of the black lung program in 1969, Congress consistently has recognized the competing policies of compensation to eligible miners, affordability to the industry, and procedural fairness to defendants as well as claimants. Coal industry representatives participated in this legislative debate involving the program.[8] As with all complex legislation, compromises had to be

---

[7] Although there is no empirical data to support the industry's perception because a very small percentage of black lung opinions are published, many in the industry believe that the use of the true doubt rule has increased significantly between the mid 1980s and the early 1990s.

[8] *Problems relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 139 (1981) (statement of Carl E. Bagge, President, NCA).

forged and for the black lung program, the liberality of the program was balanced by its procedural safeguards and Congress's promise that costs would be affordable.

DOL's administration of the black lung program achieved the liberal goals that Congress sought. More than 100,000 claims were approved under the interim presumption.[9] At the same time, however, the program had outstripped reasonable attempts at benefit funding. In an effort to restore financial solvency to the Trust Fund and tighten the eligibility criteria to eliminate awards of benefits when the medical evidence was not adequate to establish total disability or death due to black lung disease,[10] Congress ordered the elimination of the interim presumption and in 1981, Congress repealed many of the remaining statutory presumptions and rules of proof

---

[9] *1992 Annual Report* at 26 (Table 1).

[10] *See Black Lung Benefits and Revenue Amendments of 1981: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources on S. 1922*, 97th Cong., 1st Sess. 10-11 (1981); House Comm. on Ways and Means, *Report and Recommendations of the Subcomm. on Oversight on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 20 (1981) (reporting that the General Accounting Office had concluded that 84% of claims approved were based on medical evidence that was not adequate to establish disability or death due to black lung); Comptroller General of the United States, *Report to the Congress of the United States, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability*, HRD 80-81 (July 28, 1980) (reporting that "in 88.5% of the cases [decided by the Social Security Administration] medical evidence was not adequate to establish disability or death from black lung.").

favorable to claimants.[11] *See generally Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 483-90 (7th Cir. 1991) (Coffey, J., concurring). The eligibility criteria in effect for claims filed after January 1, 1982, set forth in 20 C.F.R. Part 718 (1993), require claimants to prove the "ultimate facts" of entitlement, *i.e.*, that the miner has black lung disease, that the disease arose out of the miner's coal mine employment, that the miner is totally disabled for performing his usual coal mine employment by a respiratory or pulmonary impairment, and that the miner's total disability or death is "due to" pneumoconiosis. 20 C.F.R. §§ 718.202-718.205.

Like DOL's interim presumption, the Part 718 rules do not contain any "true doubt" rule. Section 718.3 provides that although the Act intends to give claimant "the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis," it also states that "no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met." 20 C.F.R. § 718.3(c). Section 718.403 then provides that "[e]xcept as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation." 20 C.F.R. § 718.403. *See also* 20 C.F.R. § 718.307(b). No fair reading of these regulations divulges a "true doubt" rule.

---

[11] Black Lung Benefits Revenue Act of 1981, and Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635 (1981).

C. EVEN THE COURTS APPROVING THE TRUE DOUBT RULE DO NOT AGREE WITH DOL'S SCHEME

The courts of appeals do not agree on the source of DOL's rule or how it applies. DOL does not necessarily agree with the courts of appeals' formulations either. For example, the Seventh Circuit (followed by the Sixth) found the "true doubt" rule to be a creature of judicial construct. *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 10, 1993) (No. 93-935); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 17, 1993) (No. 93-964). DOL specifically denounces the Seventh Circuit's formulation of the rule.[12] The Seventh Circuit admitted that "[w]ere it not for the true doubt rule, Jones might have failed to invoke the presumption of disability [20 C.F.R. § 727.203(a)(1)], . . . The true doubt rule revived Jones's claim by giving his evidence the benefit of the evidentiary doubt." According to the Seventh Circuit, the burden then shifts to the employer to persuade the ALJ that Jones did not have pneumoconiosis under section 727.203(b)(4). 988 F.2d at 710. This is not the way DOL argued it should work in *Mullins Coal*. There DOL said that if a claimant invokes a presumption under

---

[12] DOL also takes issue with the Sixth Circuit's construction of DOL's regulations because the Sixth Circuit decided that section 718.403 does in fact allocate the burden of persuasion to the claimant. *Skukan*, 993 F.2d at 1238, 1239; Brief for the Petitioner at 30 n.17.

section 727.203(a)(1), the employer may not rebut that presumption under section 727.203(b)(4). Brief for the Federal Respondent at 24 & n.22, *Mullins Coal*, 484 U.S. 135.[13]

DOL also cites a recent decision of the Fourth Circuit to support its view that "the courts have all applied the 'true doubt' rule developed under the LHWCA to BLBA cases," citing *Greer v. Director, Office of Workers' Compensation Programs*, 940 F.2d 88 (4th Cir. 1991). Brief for the Petitioner at 27 & n.14. The court in *Greer* did not rely on any Longshore precedent to justify its use of the rule; it relied on this Court's decision in *Mullins Coal*. *Greer*, 940 F.2d at 90 n.3. The Fourth Circuit later confessed error in its reliance on *Mullins Coal* as the origin of the rule; it noted that the rule was "conceived" by the Benefits Review Board in 1978. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 n.3 (4th Cir. 1993). Notwithstanding its decision to embrace the true doubt rule in the past in cases like *Greer*, the Fourth Circuit also noted that it had not been faced with a challenge to the rule under the APA. *Grizzle*, 994 F.2d at 1098 n.7.

With the exception of the cases here and the two pending on petitions for certiorari,[14] no court, either in a black lung claim or a claim under the Longshore Act has

---

[13] Under this formulation, the constitutional concern that lurked beneath the surface in *Mullins Coal*, that there be "some rational connection between the fact proved and the ultimate fact presumed," rises to the surface. *Mullins Coal*, 484 U.S. at 159 n.32, quoting *Mobile J., & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).

[14] *Freeman United Coal Mining*, 988 F.2d 706; *Skukan*, 993 F.2d 1228.

validated the true doubt rule in the face of an APA challenge. No court has accepted DOL's "true doubt" rule based on its presence in the Longshore Act or the Black Lung Act. No court has accepted DOL's "true doubt" rule because it found it in DOL's regulations. No court has embraced the rule by virtue of its alleged longstanding history. Nor does DOL's scheme withstand scrutiny at any level. DOL's argument in support of the rule is riddled with inconsistencies. The only thing that is clear about the rule is that in practice, it deprives the party opposing a claim of the right to insist on credible proof of its liability for benefits.

D. DOL'S TRUE DOUBT RULE IS NEITHER WORKABLE NOR FAIR

The Department of Labor argues that whether considered under Part 727 or Part 718, a claimant is required only to produce sufficient evidence to support an award of benefits. Then, according to DOL, the burden shifts to the employer to produce evidence disproving claimant's eligibility. The "true doubt" rule comes into play only after the claimant has met his or her burden and the employer has introduced "equally (but no more) probative evidence contesting eligibility." Brief for the Petitioner at 29-30 n.16. If employer produces evidence that is more probative, the "true doubt" rule does not apply, or so DOL alleges.[15] DOL also suggests, at least in this Court, that the rule should only rarely be used.

---

[15] DOL suggests mine operators have an adequate opportunity to defend claims based on the fact that even with a "true doubt" rule, the approval rate for black lung claims in recent

In practice, DOL's burden allocation scheme does not work the way DOL suggests. ALJs do not agree on what standard applies to determine whether claimant has met his or her burden and ALJs do not resort to the rule as a "last resort." A survey of ALJ decisions shows that, in practice, the only consistency in the application of the notion that "true doubt" should be resolved in claimants' favor is its inconsistency. The rule comes into play in a host of contexts or not at all depending, it seems, more on the preferences of the ALJ than any other factor. For example, ALJs have resolved conflicts in the evidence in favor of claimants based on "true doubt,"[16] "reasonable doubt,"[17] "all doubt,"[18]

years has been approximately seven percent. Brief for the Petitioner at 33 n.19. The figure cited by the petitioner refers to approvals of claims filed after January 1, 1982, subject to 20 C.F.R. Part 718. The overall approval rate for all black lung claims is 47.9 percent. *1992 Annual Report* at 26 (Table 1).

[16] *McLone v. Maiden Mining, Inc.*, 16 Black Lung Rep. (MB) 3-717, 3-721 (ALJ 1992); *Smith v. Peabody Coal Co.*, 16 Black Lung Rep. (MB) 3-622, 3-628 (ALJ 1992) (in the context of the irrebuttable presumption under 20 C.F.R. § 718.304); *Sanson v. Director*, 16 Black Lung Rep. (MB) 3-183, 3-189 (ALJ 1992); *Sutherland v. Clinchfield Coal Co.*, 14 Black Lung Rep. (MB) 3-862, 3-865 (ALJ 1991); *Matthews v. Quinland Coals, Inc.*, 14 Black Lung Rep. (MB) 3-117, 3-119 (ALJ 1990).

[17] *Kennedy v. Shannon Pocahontas Mining Co.*, 16 Black Lung Rep. (MB) 3-942, 3-947 (ALJ 1992); *Griffiths v. B-D Mining Co.*, 16 Black Lung Rep. (MB) 3-673, 3-682 (ALJ 1992); *DiRienzo v. Director*, 14 Black Lung Rep. (MB) 3-849, 3-855 (ALJ 1991); *Hart v. Peabody Coal Co.*, 3 Black Lung Rep. (MB) 3-21, 3-24 (ALJ 1981).

[18] *McKeehan v. Director*, 14 Black Lung Rep. 3-524, 3-528 (ALJ 1990); *Guyer v. Director*, 3 Black Lung Rep. 3-79, 3-84 (ALJ 1981); *Fowler v. Director*, 13 Black Lung Rep. (MB) 3-389, 3-394 (ALJ 1989).

"the doubt,"[19] "sufficient doubt,"[20] "doubtful evidence,"[21] and "any doubt."[22] Others have declined to find in favor of claimant on evidence that is tied.[23] The Benefits Review Board generally affirms all but the most egregious "doubt" cases on substantial evidence grounds.

The practical effect of DOL's allocation scheme necessarily is either to permit an ALJ to find a fact on less than a preponderance or to impose upon the employer the burden of proving a fact by something more than a preponderance.[24] Under DOL's scheme, in order to defend a

[19] *Gilliam v. S. G. Coal Co., Inc.*, 15 Black Lung Rep. (MB) 3-164, 3-167 (ALJ 1991); *Cook v. Consolidation Coal Co.*, 13 Black Lung Rep. (MB) 3-601, 3-610 (ALJ 1990).

[20] *Poff v. Westmoreland Coal Co.*, 16 Black Lung Rep. (MB) 3-53, 3-60 (ALJ 1991).

[21] *Shaff v. U.S. Steel Mining Co.*, 16 Black Lung Rep. (MB) 3-612, 3-616 (ALJ 1992).

[22] *Gasperetti v. Director*, 16 Black Lung Rep. (MB) 3-956, 3-959 (ALJ 1992); *Bohr v. Director*, 14 Black Lung Rep. (MB) 3-476, 3-483 (ALJ 1990); *Jones v. Alabama By-Products*, 4 Black Lung Rep. (MB) 3-75, 3-86 (ALJ 1982).

[23] *See, e.g., Blackburn v. Director*, 14 Black Lung Rep. (MB) 3-475, 3-750 (ALJ 1990); *Roberts v. Blue Diamond Coal Co.*, 13 Black Lung Rep. (MB) 3-327, 3-335 (ALJ 1989) (holding that the "evidence is hopelessly equivocal and, as such, is insufficient to establish the existence of pneumoconiosis."); *Honeycutt v. Triple B Corp.*, 13 Black Lung Rep. (MB) 3-746, 3-756 (ALJ 1990) (holding that "the burden of proof [is] always on Claimant to establish total respiratory disability by a preponderance of the evidence.").

[24] *See, e.g., Pahira v. Blaschak Coal Co.*, 13 Black Lung Rep. (MB) 3-491, 3-494 (ALJ 1990) (where the ALJ held: "While there is a slight preponderance of negative interpretations, it is not such as to remove all doubt as to the Claimant's condition.

claim, the employer must eliminate all doubt. This is not a permissible scheme. *See Charlton v. F.T.C.*, 543 F.2d 903, 907 (D.C. Cir. 1976) (holding "[i]n American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating 'something less than the weight of the evidence.' ") (footnotes omitted).

A simple example is illustrative. For claims filed after January 1, 1982, no benefits are payable under the Act unless the miner has pneumoconiosis and no presumptions operate to rebuttably presume the existence of pneumoconiosis. The agency factfinder must find pneumoconiosis or is compelled to deny the claim. Traditionally, if the weight of the evidence proves that the miner has black lung disease, the fact is established. If the evidence pro and con is of equal weight, however, nothing is proven no matter which party is assigned what kind of burden. Even if the employer is assigned a burden of persuasion and musters a tie in the evidence, all that may be said is that the employer failed to prove that the miner does not have pneumoconiosis, but it does not also affirmatively prove that the miner has the disease. Where the weight of the evidence fails to prove either that the miner has or does not have pneumoconiosis, with or without the APA, the fact is not proven.

Consequently, I find that the doubt is to be resolved in Claimant's favor. I find the existence of pneumoconiosis has been established by the X-ray evidence pursuant to § 718.202.").

Under DOL's scheme, however, that failure of evidence is sufficient to establish that the miner has pneumoconiosis. Therefore, in order to defend a claim, the party opposing entitlement must do more than submit evidence which is sufficient to support a denial of benefits – such evidence would simply produce a tie. The party opposing entitlement must produce evidence which overcomes the doubt, *i.e.*, proof beyond true doubt. That is precisely what the rule on which DOL relies provides. 20 C.F.R. § 718.3 That is an allocation of risk of error that is not generally applied in the context of civil proceedings. It is "an ancient and honored aspect of our criminal justice system." *Victor v. Nebraska*, slip op. at 8, 62 U.S.L.W. 4179 (U.S. March 22, 1994) (No. 92-8894). Such a standard may not be imposed by unwritten agency interpretation, case law or snatches of legislative history showcasing the liberal intentions of the Act. *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 636 (1983); *Pepco v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n.18 (1980).

The coal industry has relied on the procedural safeguards of the APA to prevent benefit awards based on evidence that is proven unreliable or inconclusive. Seven years ago, NCA argued to this Court that the Act must be construed consistently with the APA to allow facts to be proven only on the basis of reliable, probative and substantial evidence. If the APA cannot be construed to guarantee the orderly and fair consideration of a case, even a black lung case, its application is illusory and the APA's undeniable purpose to eliminate unfairness in administrative proceedings is defeated.

———♦———

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

HAROLD P. QUINN, JR.
Counsel of Record
National Coal Association
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2652

Counsel for Amicus Curiae
National Coal Association

No. 92-744

FILED

In The

Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1993

DISTRIBUTED

APR 1 1994

Director, Office of Workers' Compensation Programs, United States Department of Labor,

Petitioner,

v.

Greenwich Collieries, et al.,

Respondents.

Director, Office of Workers' Compensation Programs, United States Department of Labor,

Petitioner,

v.

Marine Terminals, Inc., et al.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third Circuit

---

BEST AVAILABLE COPY

QUESTION PRESENTED

The Department of Labor's "true doubt" rule assigns to the opponent of a benefits claim under the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act the burden of persuading the factfinder that the claimant is *not* entitled to benefits.

Does the true doubt rule violate section 7(c) of the Administrative Procedure Act, which assigns the "burden of proof" to the "proponent" of a rule or order?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. SECTION 7(C) OF THE APA ASSIGNS THE BURDEN OF PERSUASION TO THE CLAIMANT IN BLBA AND LHWCA CASES	4
A. The Court Should Overrule Its Statement Regarding APA Section 7(c) in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).	4
B. The Ordinary Meaning of APA Section 7(c), in Line with Traditional Practice, Is That "Burden of Proof" Places on the Proponent the Burden of Persuasion.	8
C. The Legislative History of APA Section 7(c) Supports the Understanding That "Burden of Proof" Includes the Burden of Persuasion.	15
II. APA SECTION 7(C) IS FULLY APPLICABLE TO THESE CASES	19
A. The BLBA Regulation Petitioner Relies Upon Is Grossly Insufficient To Supersede the APA.	20
B. Nothing in the LHWCA Is Inconsistent with the Burden of Proof in Section 7(c).	22
III. TRUE DOUBT IS AN UNFAIR AND UNWARRANTED RULE THAT UNDERMINES THE REASONED ADJUDICATION OF BENEFITS CLAIMS	25
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:	Page(s)
Alameda County Training & Employment Bd. v. Donovan, 743 F.2d 1267 (9th Cir. 1984)	7
American Dredging Co. v. Miller, 114 S. Ct. 981 (1994)	23
American Trucking Ass'n v. United States, 344 U.S. 298 (1953)	13,14
Arthur v. Unkart, 96 U.S. 118 (1877)	13
Artz v. A&H Coal Co., 16 BLR 3-192 (1992)	26
Ass'n of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System, 745 F.2d 677 (D.C. Cir. 1984)	21
Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117 (5th Cir. 1980)	24
Bauer v. Clark, 161 F.2d 397 (7th Cir.), *cert. denied*, 332 U.S. 839 (1947)	10
Beal v. Director, OWCP, 15 BLR 3-297 (1991)	26
Bell Helicopter Int'l, Inc. v. Jacobs, 746 F.2d 1342 (8th Cir. 1984)	24
Bos Lines, Inc. v. CIR, 354 F.2d 830 (8th Cir. 1965)	10
Bosma v. United States Dep't of Agriculture, 754 F.2d 804 (9th Cir. 1984)	6
Brosnan v. Brosnan, 263 U.S. 345 (1923)	9
Brownell v. Tom We Shung, 352 U.S. 180 (1956)	21
Cantrell v. Wallick, 117 U.S. 689 (1886)	9
Central Vermont R. Co. v. White, 238 U.S. 507 (1915)	23
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	17
CIR v. Bain Peanut Co., 134 F.2d 853 (5th Cir. 1943)	23
CIR v. Southern Bell Tel. & Tel. Co., 102 F.2d 397 (6th Cir. 1930)	10

Table of Authorities Continued

	Page
Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939)	23
Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941)	9
Commonwealth of Puerto Rico v. Federal Maritime Commission, 468 F.2d 872 (D.C. Cir. 1972)	7
Dept. of Water & Power v. Anderson, 95 F.2d 577 (9th Cir.), *cert. denied*, 305 U.S. 607 (1938)	10
Director, OWCP v. Peabody Coal Co., 554 F.2d 310 (7th Cir. 1977)	22
Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (1976), *cert. denied*, 431 U.S. 925 (1977)	6-8,13-18
Evosevich v. Consolidation Coal Co., 789 F.2d 1021 (3d Cir. 1986)	24
Freeman United Coal Mining Co. v. OWCP, 988 F.2d 706 (7th Cir. 1993), *petn. for cert. pending*, No. 93-935	6
Gasperetti v. Director, OWCP, 16 BLR 3-956 (1992)	26
Ginn v. Dolan, 90 N.E. 141 (Ohio 1909)	13,19
Griffiths v. B-D Mining Co., 16 BLR 3-673 (1992)	26
Hazardous Waste Treatment Council v. EPA, 886 F.2d 335 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 998 (1990)	6
Kennedy v. Shannon Pocahontas Mining Co., 16 BLR 3-942 (1992)	26
Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960)	10,14,15
Kintzel v. Kintzel Coal Co., 16 BLR 3-841 (1992)	26
Lappinen v. Union Ore Co., 29 N.W.2d 8 (Minn. 1947)	25
Maine v. United States Dep't of Labor, 669 F.2d 827 (1st Cir. 1982)	7

Table of Authorities Continued

	Page
McGlone v. Maiden Mining, Inc., 16 BLR 3-717 (1992)	26
Medina v. California, 112 S. Ct. 2572 (1992)	25
Merritt v. United States, 960 F.2d 15 (2d Cir. 1992)	6
Miller v. Leonard, 588 So.2d 79 (La. 1991)	26
Mills v. Plastics Universal Corp., 15 BLR 3-838 (1991)	26
Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992)	8
Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624 (1983)	28
Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)	5
Nickles v. Tackett & Manning Coal Co., 14 BLR 3-827 (1991)	26
Nikitiuk v. Pishtey, 219 A.2d 225 (Conn. 1966)	13
NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300 (5th Cir. 1961)	14
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)	2,4-8,13
Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975)	7
Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541 (9th Cir. 1950)	13
People v. Bilyew, 383 N.E.2d 212 (Ill. 1978)	25
Perrin v. United States, 444 U.S. 37 (1979)	8
Poff v. Westmoreland Coal Co., 16 BLR 3-53 (1991)	26
Preston v. Keith, 584 A.2d 439 (Conn. 1991)	26
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	5
Pupo v. State Coal Co., 16 BLR 3-685 (1992)	26
Radio Corp. of America v. Radio Engineering Laboratories, Inc., 293 U.S. 1 (1934)	9

Table of Authorities Continued

	Page
Reliance Life Ins. Co. v. Burgess, 112 F.2d 234 (8th Cir.), *cert. denied*, 311 U.S. 699 (1940)	10
R. Gsell & Co., Inc. v. CIR, 294 F.2d 321 (2d Cir. 1961)	10
Richardson v. Perales, 402 U.S. 389 (1971)	24
Rusk v. Cort, 369 U.S. 367 (1962)	21
Sanson v. Director, OWCP, 16 BLR 3-183 (1992)	26
Shaff v. U.S. Steel Mining Co., 16 BLR 3-612 (1992)	26
Shaughnessy v. Pedreiro, 349 U.S. 48 (1955)	21
Skukan v. Consolidation Coal Co., 993 F.2d 1228 (6th Cir. 1993), *petn. for cert. pending*, No. 93-964	6
Slone v. Wolf Creek Collieries, 15 BLR 3-430 (1991)	26
Smith v. Hill, 122 N.E. 310 (Mass. 1919), *aff'd*, 260 U.S. 592 (1923)	13
Smith v. Peabody Coal Co., 16 BLR 3-622 (1992)	26
Smith v. United States, 113 S. Ct. 2050 (1993)	8
Southern Stevedoring Co., Inc. v. Voris, 190 F.2d 275 (5th Cir. 1951)	24
Steadman v. SEC, 450 U.S. 91 (1981)	14
Stills v. Pyro Mining Co., 14 BLR 3-834 (1991)	26
St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993)	19
Sutherland v. Clinchfield Coal Co., 14 BLR 3-862 (1991)	26
Tampa Ship Repair & Dry Dock Co., Inc. v. Director, OWCP, 535 F.2d 936 (5th Cir. 1976)	24
Toledano v. CIR, 362 F.2d 243 (5th Cir. 1966)	10
United States v. All Right, Title and Interest in Real Property Known as 785 St. Nicholas Ave., 983 F.2d 396 (2d Cir.), *cert. denied*, 113 S. Ct. 2349 (1993)	10

Table of Authorities Continued

	Page
United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977)	25
United States v. Land, Property Recorded in Name of Neff, 960 F.2d 561 (5th Cir. 1992)	10
United States v. Smith, 215 F.2d 217 (6th Cir. 1954)	10
United States v. Springer, 491 F.2d 239 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974)	14
U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982)	24
U.S. Pipe & Foundry Co. v. Webb, 595 F.2d 264 (5th Cir. 1979)	22
Willinsky v. Director, OWCP, 16 BLR 3-536 (1992)	26
Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)	11
Statutes and Regulations:	
Administrative Procedure Act:	
5 U.S.C. § 554	23
5 U.S.C. § 556(d)	*passim*
5 U.S.C. § 559	3,21
Black Lung Benefits Act, 30 U.S.C. §§ 901, *et seq.*:	*passim*
30 U.S.C. § 932(a)	4,20-22
Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*	19
Communications Act of 1934:	
47 U.S.C. § 309(e)	11
47 U.S.C. § 312(d)	11
Internal Revenue Code:	
26 U.S.C. § 534	10
26 U.S.C. § 6902(a)	10
26 U.S.C. § 7454(a)	10

Table of Authorities Continued

	Page
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*:	*passim*
33 U.S.C. § 919(d)	4,23
33 U.S.C. § 923(a)	22-24
Social Security Act:	
42 U.S.C. § 416(i)(1)	15
42 U.S.C. § 423(c)(2)	15
8 U.S.C. § 1160(b)(3)(B)	10
11 U.S.C. § 362(g)	10
19 U.S.C. § 1615	10
20 C.F.R. § 702.339	23
20 C.F.R. § 718.3(c)	20-22
Other Authorities:	
Attorney General's Manual on the Administrative Procedure Act (1947)	16,27
Black's Law Dictionary (6th ed. 1990)	8,9
K. Davis, *Administrative Law Treatise* (2d ed. 1980)	7
L.P. King, *Collier on Bankruptcy* (15th ed. 1990)	10
A. Larson, *The Law of Workmen's Compensation* (1976)	24
A. Larson, *The Law of Workmen's Compensation* (1993)	12,24,25
Legislative History of the Administrative Procedure Act, S. Doc. 248, 79th Cong., 2d Sess. (1945)	15-18
J. Stein, *et al.*, *Administrative Law* (1993)	7
J.W. Strong, *McCormick on Evidence* (4th ed. 1992)	11
9A *Uniform Laws Annotated*, Uniform Rule of Evidence 1(4) (1965)	9
Wigmore on Evidence (Chadbourn rev. 1981)	11,12,23

INTEREST OF *AMICUS CURIAE*

The American Insurance Association ("AIA") is a national trade association, with headquarters in Washington, D.C., representing more than 250 property and casualty insurance companies in the United States writing a major portion of the nation's property and casualty insurance. AIA member companies are affiliated with thousands of independent insurance agents nationwide. They employ over 145,000 people, and in 1992 contributed over $2 billion in state taxes and fees (including payroll taxes) to state governments. AIA members also write coverage under the Black Lung Benefits Act ("BLBA") and the Longshore and Harbor Workers' Compensation Act ("LHWCA"). AIA's purposes include promoting the economic, legislative, and public standing of its members; providing a forum for discussion of policy problems of common concern to members; and apprising members of judicial, regulatory, and legislative developments.

In 1992, AIA members wrote almost $13 billion in workers' compensation premiums (including premiums for BLBA and LHWCA coverage), constituting a substantial portion nationally of the private market for workers' compensation insurance. AIA members write some BLBA and LHWCA business in the voluntary market and also are subject to liability under the BLBA and LHWCA through individual state-assigned risk pools, the liabilities of which are reinsured by insurance carriers, including AIA members, through the National Workers' Compensation Reinsurance Pool.

AIA members have a strong interest in the financial health and stability of all workers' compensation programs, including the BLBA and LHWCA. The AIA files this brief *amicus curiae* because of its interest in the stability of federal workers' compensation programs and the concomitant concern about potential new liabilities under those programs should the Court sustain the Department of Labor's position. The Department's "true doubt" rule is a

departure from the long-established principle in state workers' compensation programs that a claimant is required to prove entitlement to benefits by a preponderance of the evidence. The AIA is concerned that affirmation of the true doubt rule might influence state workers' compensation systems as well.*

SUMMARY OF ARGUMENT

The Department of Labor's "true doubt" rule stands on its head the most basic principle of workers' compensation: that the claimant must demonstrate disability and entitlement to benefits. The Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901, *et seq.*, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq.*, are workers' compensation statutes that, like all such statutes, establish mechanisms for the fair and efficient resolution of employee disability claims. The BLBA and LHWCA incorporate a series of evidentiary presumptions in favor of recovery, but do not, either implicitly or explicitly, absolve the claimant of the burden of establishing the facts requisite to invoke the presumptions. The true doubt rule does that. The rule shifts to the employer in BLBA and LHWCA cases the burden of proving by a preponderance of the evidence that a claimant is *not* entitled to benefits.

The true doubt rules violates section 7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d), which expressly assigns the burden of proof, including the burden of persuasion, to the claimants in these cases. In this regard, the Court should overrule the statement in a footnote in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that section 7(c) assigns only the burden of production. The Court there relied on only one source, a court of appeals decision that misread the language and legislative history of the APA.

APA section 7(c) assigns the "burden of proof" to the proponent of a rule or order. The ordinary and most common meaning of "burden of proof" is the burden of persuading the factfinder. The courts long have used "burden of proof" in exactly this way, and Congress repeatedly has used the phrase to mean burden of persuasion in other statutes. APA section 7(c) is no exception. This understanding of "burden of proof" in section 7(c) is consistent also with the traditional principle that the proponent in any proceeding who seeks to change the status quo has the burden of persuasion.

The legislative history of section 7(c) strongly supports this reading. Congress substituted "burden of proof" in section 7(c) for the phrase "burden of proceeding" in a predecessor bill, and explained that the final language represents the "standard rule." Other legislative history describes a system fully consistent with the traditional burdens: The proponent of a rule or order has the burden of establishing a prima facie case. The burden of production then shifts to the opponent to rebut the presumption, but the ultimate burden of persuasion remains with the proponent.

APA section 7(c) is fully applicable to the present cases. Petitioner argues that a BLBA regulation discussing "reasonable doubt" supersedes APA section 7(c), but that incoherent regulation falls far short of the express statement of supersedure required by APA section 12, 5 U.S.C. § 559. Petitioner argues also that a provision of the LHWCA suspending technical rules of evidence and procedure supersedes APA section 7(c). Petitioner ignores other language in the LHWCA explaining that nothing in that statute should be read to supersede provisions of the APA. Moreover, the burden of proof is not a technical rule of evidence or procedure, but a rule of substantive law necessary to the fair adjudication of factual disputes.

The true doubt rule is fundamentally unfair. It undermines the correct resolution of administrative claims by giving administrative law judges a license to ignore their responsibilities and to award benefits irrespective of the merits of the claim.

*Counsel to the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

ARGUMENT

I

SECTION 7(C) OF THE APA ASSIGNS THE BURDEN OF PERSUASION TO THE CLAIMANT IN BLBA AND LHWCA CASES

Section 7(c) of the APA declares that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Both the BLBA and LHWCA incorporate this and other APA provisions expressly. 30 U.S.C. § 932(a); 33 U.S.C. § 919(d). Accordingly, the "proponent" in a benefits hearing under the BLBA or LHWCA—the claimant who seeks benefits—has the burden of proof.[1] The true doubt rule violates section 7(c) because it assigns the burden of proof to the employer rather than to the claimant; the rule requires that the employer ultimately must persuade the factfinder that the claimant is not entitled to benefits.

A. The Court Should Overrule Its Statement Regarding APA Section 7(c) in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The AIA concedes that the foregoing argument is inconsistent with a footnote in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in which the Court declared that section 7(c) of the APA "determines only

[1] Respondent Santoro purports to find ambiguity in the meaning of "proponent" in workers' compensation proceedings under the BLBA and LHWCA because the administrative law judge ("ALJ") must determine "the rights of the parties" and because it is the employer who sometimes requests a formal hearing. Brief of Respondent Santoro at 8 & n.3. There is no ambiguity. That both parties have rights, and that either party may ask for a formal hearing, is irrelevant to the claim being adjudicated before the ALJ. The claimant, by definition, seeks an order granting benefits. The employer who contests benefits seeks only to maintain the status quo. The claimant in a benefits adjudication plainly is the "proponent" under the APA, a point petitioner does not contest.

the burden of going forward, not the burden of persuasion." *Id.*, at 404 n.7.[2] The AIA believes that this statement is an incorrect assertion of the law. APA section 7(c) assigns to the proponent of a rule or order the burden of persuasion. The Court should overrule the statement to the contrary in *Transportation Management*.

Voiding this one-sentence statement in a footnote in *Transportation Management* will have no effect on the ultimate holding of that case. *Transportation Management* involved a mixed motive situation. The Court upheld a National Labor Relations Board ("NLRB") rule that shifted the burden of persuasion to the employer once the NLRB General Counsel had demonstrated by a preponderance of evidence that an employment decision had been motivated by antiunion animus. The employer then could avoid liability by proving that it would have made the same decision in the absence of antiunion animus.

The Court explained that the General Counsel meets its burden under the National Labor Relations Act by establishing the elements of an unfair labor practice. Shifting the burden to the employer to prove a mixed motive defense does not violate the statutory requirement that the General Counsel prove its case. *Id.*, at 401-402. The Court has approved similar burden-shifting regimes in other mixed motive cases. See *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In each instance, the plaintiff or proponent of the action retains the burden of persuasion on the fundamental issue of liability; the burden of per-

[2] Respondent Greenwich Collieries argues that the statutory criteria for benefits under the BLBA and LHWCA must be established by a preponderance of the evidence, regardless of which party has the burden of persuasion. The true doubt rule, which allows the ALJ to find that the claimant is entitled to benefits in the absence of a preponderance of the evidence, therefore violates section 7(c). The AIA fully agrees with Greenwich Collieries' argument, but believes that the true doubt rule violates section 7(c) also because that provision of the APA places the burden of persuasion on the claimant.

suasion shifts only after such proof is made, and only on the mixed motive issue.

Respondent in *Transportation Management* argued that section 7(c) of the APA requires the General Counsel to retain the burden of persuasion at all times. The Court rejected that argument by asserting that 7(c) does not assign the burden of persuasion. 462 U.S., at 404 n.7. The Court could have explained instead that in mixed motive cases the proponent meets its burden of persuasion under section 7(c) by proving that the defendant's behavior stemmed from an improper motive.

In the cases presently before the Court, the burden on claimants is to prove entitlement to benefits. The true doubt rule violates section 7(c) because it shifts the burden of persuasion to the employer when the evidence is in equipoise, before the claimant has proven anything.

The *Transportation Management* Court cited only one source in support of its statement regarding section 7(c): the D.C. Circuit's decision in *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998 (1976), *cert. denied*, 431 U.S. 925 (1977). That court of appeals opinion is the only judicial decision to have analyzed the problem in any detail. Petitioner and respondent Santoro cite several court of appeals decisions in support of the allegedly "well established" rule that section 7(c) assigns only the burden of production, but all of those cases, save one, relied either on *Transportation Management* or *Environmental Defense Fund* ("*EDF*"), or on a decision that ultimately relied on *EDF*.[3] Even the commentators petitioner cites rely on *EDF*

[3] See *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1237-1238 (6th Cir. 1993) (relying on *Transportation Management*), *petn. for cert. pending*, No. 93-964 ; *Freeman United Coal Mining Co. v. OWCP*, 988 F.2d 706, 711 (7th Cir. 1993) (same), *petn. for cert. pending*, No. 93-935; *Dazzio v. FDIC*, 970 F.2d 71, 77 (5th Cir. 1992) (same; burden of persuasion not at issue); *Merritt v. United States*, 960 F.2d 15, 18 (2d Cir. 1992) (same; burden of persuasion not at issue); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 335, 366 (D.C. Cir. 1989) (relying on *EDF*), *cert. denied*, 498 U.S. 998 (1990); *Bosma v. United States Dep't of Agriculture*, 754 F.2d 804, 810 (9th Cir. 1984) (relying on *Transportation Management*); *Alameda County Training & Employment Bd. v. Donovan*, 743 F.2d 1267, 1269 (9th Cir. 1984) (relying on *Maine*); *Maine v. United States Dep't of Labor*, 669 F.2d 827, 829 (1st Cir. 1982) (relying on *EDF*).

and *Transportation Management*.[4] Only *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 39-40 (7th Cir. 1975), decided before *EDF*, supplied its own analysis, but that court relied on the same misreading of legislative history as the court in *EDF*. See *infra* at 17-18.[5]

[4] See 4 J. Stein, *et al.*, *Administrative Law* § 24.02, at 24-21 n.3 (1993) (relying on *EDF* and *Transportation Management*); 3 K. Davis, *Administrative Law Treatise* § 16.9, at 257-258 (2d ed. 1980) (relying on *EDF*).

[5] *Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972), cited by Respondent Santoro, is notable because that pre-*EDF* D.C. Circuit case actually supports AIA's position here. The *Puerto Rico* court asserted that the rule in APA section 7(c) is subject to "reasonable construction and limitations," and then explained the construction of the rule in the ordinary case: "the rule requiring the proponent of an order to sustain the burden of its justification rests on the policy requiring a person seeking a change from the status quo to take on the burden of justifying the change." 468 F.2d, at 881. In BLBA and LHWCA benefit cases, the claimant seeks a change from the status quo, and therefore bears the burden of justifying the change. In other cases, the burden may be elsewhere because another party is properly the "proponent."

Much the same point is made in 4 J. Stein, *et al.*, *Administrative Law* § 24.02 (1993), upon which petitioner relies. The commentators there explain that the difficulty in assigning the burden of persuasion under the APA stems from the problem of determining the "proponent." In many cases, courts have held that a party holding a government-approved claim or license is the "proponent" even when the government initiates proceedings to challenge that claim or license. *Id.*, at 24-25 - 24-27. The determination that the party in receipt of a benefit remains the proponent is another explanation for decisions like *EDF*, which involved the attempt to suspend certain pesticide registrations. The holder of the benefit in that case was the chemical company, upon whom the D.C. Circuit placed the burden of persuasion. In the present cases, the claimants seek BLBA and LHWCA benefits and are therefore the "proponents." See *infra* n.6.

EDF is plainly wrong on this issue.[6] The D.C. Circuit reached its result in that case by misreading the language and legislative history of the APA, as well as earlier federal court decisions that had reached the opposite result.[7] The better reading, consistent with the ordinary meaning of the language in the APA and its legislative history, is that section 7(c) assigns the burden of persuasion.

B. The Ordinary Meaning of APA Section 7(c), in Line with Traditional Practice, Is That "Burden of Proof" Places on the Proponent the Burden of Persuasion.

It is a cornerstone of statutory construction that undefined words in a statute must be given their ordinary or common meaning. *Smith v. United States*, 113 S. Ct. 2050, 2054 (1993); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992); *Perrin v. United States*, 444 U.S. 37, 42 (1979). The ordinary and most common meaning of the phrase "burden of proof" is the burden of persuading the factfinder by a particular quantum of proof. Although some courts and commentators have used "burden of proof" to mean only the burden of producing evidence, the far more common and natural reading of that phrase is the burden of persuasion, which generally includes the initial burden of producing evidence as well.

Thus, *Black's Law Dictionary* begins its definition of "burden of proof" with the common understanding, and then explains its two components:

> [T]he necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.
>
> Burden of proof is a term which describes two different concepts; first, the "burden of persuasion", which under the traditional view never shifts from one party to the other at any stage of the proceeding, and the second, the "burden of going forward with the evidence", which may shift back and forth between the parties as the trial progresses.

Black's Law Dictionary 196 (6th ed. 1990). See also 9A *Uniform Laws Annotated*, Uniform Rule of Evidence 1(4) (1965) (" 'Burden of proof' means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with 'burden of persuasion.' ").

Consistent with this ordinary understanding, this Court regularly used "burden of proof" to mean burden of persuasion in the years prior to the passage of the APA. E.g., *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 108-110 (1941) (in admiralty suit between shipowner and shipper, "burden of proof" on shipowner means that "the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception"); *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7, 8 (1934) (one asserting prior invention defense against presumptively valid patent has "burden of proof" to make its case beyond a reasonable doubt); *Brosnan v. Brosnan*, 263 U.S. 345, 347-349 (1923) (establishment of prima facie case by party with "burden of proof" "did not relieve him from the ultimate burden of persuasion"); *Cantrell v. Wallick*, 117 U.S. 689, 695-696 (1886) (same as *Radio Corp.*).

Other federal courts have recognized that "burden of proof" in its "primary sense" means the burden of per-

---

[6] As with *Transportation Management*, rejection of the *EDF* reading of the burden of proof under section 7(c) will not undermine the holding of that case. The D.C. Circuit could have reached the same result by holding, as have other courts, that the "proponent" in a proceeding challenging the validity of a government license or registration is the holder of the government benefit. See *supra* n.5. Moreover, the D.C. Circuit's discussion of APA section 7(c) in *EDF* ultimately was dictum, as the court concluded that the APA did not apply to the suspension hearings at issue. 548 F.2d, at 1015.

[7] See *infra* at 13-18.

suasion. E.g., *United States v. Smith*, 215 F.2d 217, 219 (6th Cir. 1954); *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir.), *cert. denied*, 332 U.S. 839 (1947); *Reliance Life Ins. Co. v. Burgess*, 112 F.2d 234, 237-238 (8th Cir.), *cert. denied*, 311 U.S. 699 (1940). The Ninth Circuit in 1938 explained that the "proper sense" of the phrase "burden of proof" is "the burden of proving the issue in controversy to the degree required therein." *Dept. of Water & Power v. Anderson*, 95 F.2d 577, 583, *cert. denied*, 305 U.S. 607 (1938).

Congress has used the phrase "burden of proof" in statutes other than the APA, and federal courts have had little difficulty finding that these statutes assign the burden of persuasion. The Internal Revenue Code, for example, uses "burden of proof" in several sections. See, e.g., 26 U.S.C. § 534; 26 U.S.C. § 6902(a); 26 U.S.C. § 7454(a). In each instance, federal courts assign to the statutorily-designated party the burden of persuasion. E.g., *R. Gsell & Co., Inc. v. CIR*, 294 F.2d 321, 325-326 (2d Cir. 1961); *Bos Lines, Inc. v. CIR*, 354 F.2d 830, 836 (8th Cir. 1965); *CIR v. Southern Bell Tel. & Tel. Co.*, 102 F.2d 397, 401-402 (6th Cir. 1930); *Toledano v. CIR*, 362 F.2d 243, 247 (5th Cir. 1966). See also *Kerner v. Flemming*, 283 F.2d 916, 921 n.8 (2d Cir. 1960) (Friendly, J.) (noting that Congress had spoken "clearly" in these Internal Revenue Code provisions in assigning the burden of persuasion). Other statutes are to the same effect.[8]

[8] E.g., 19 U.S.C. § 1615 ("burden of proof" in forfeiture proceedings under Tariff Act of 1930); *United States v. All Right, Title and Interest in Real Property Known as 785 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir.) (§ 1615 assigns "burden of proof ... to demonstrate by a preponderance of the evidence"), *cert. denied*, 113 S. Ct. 2349 (1993); *United States v. Land, Property Recorded in Name of Neff*, 960 F.2d 561, 563 (5th Cir. 1992) (same); 11 U.S.C. § 362(g) ("burden of proof" in hearing concerning relief from automatic stay in bankruptcy); 2 L.P. King, *Collier on Bankruptcy* ¶ 362.11, at 362-82 (15th ed. 1990) (§ 362(g) assigns the "burden of proof (risk of nonpersuasion)"). Compare also 8 U.S.C. § 1160(b)(3)(B)(i) (alien has "burden of proving by a preponderance of the evidence") with 8 U.S.C. §§ 1160(b)(3)(B)(ii) & (iii) (referring to "burden of proof" in clause (i)).

That Congress ordinarily uses "burden of proof" to mean more than the burden of production is evident as well from the Communications Act of 1934. That statute twice explains that a party has both "the burden of proceeding with the introduction of evidence and the burden of proof." 47 U.S.C. §§ 309(e) & 312(d). The contrast between these two burdens is potent evidence of the meaning of "burden of proof."

The meaning of "burden of proof" in APA section 7(c) is informed not only by the ordinary meaning of that phrase, but from the larger statutory context. Section 7(c) assigns the burden of proof to the "proponent" of a rule or order, that is, to the party seeking to change the status quo. The traditional rule is that a party seeking to change the status quo bears the burden of persuasion. In common parlance, the plaintiff bears the burden of proof. See 2 J.W. Strong, *McCormick on Evidence* 428 (4th ed. 1992) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."); 9A *Wigmore on Evidence* § 2485, at 286 (Chadbourn rev. 1981) ("in practical affairs generally, the burden of proof (in the sense of risk of nonpersuasion) signifies that upon a person desiring action from M will fall the penalty of M's nonaction unless M can be persuaded . . . as to the truth of the propositions prerequisite to his action").

Petitioners in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 669 (1979), argued that the phrase "burden of proof" in 25 U.S.C. § 194 assigns only the burden of production. The Court responded that the phrase "may" be ambiguous, but held, in light of the "evident purpose" of the statute and other statutory language, that the statute assigned both the burden of persuasion and the burden of producing evidence. *Id.* That issue could have been decided on the basis of the ordinary meaning of "burden of proof." Nonetheless, to the extent the Court may find ambiguity in the phrase "burden of proof" in APA section 7(c), that ambiguity is resolved by examination of the traditional rule and the legislative history. See *infra* at 11-13, 15-19.

One important example of this rule appears in state workers' compensation schemes, the analogs of the BLBA and LHWCA, which uniformly assign the burden of persuasion to the proponent of the benefit award. The leading authority on workers' compensation describes the "basic rule" that the burden of proof is on the claimant; even where there are presumptions in favor of an award of benefits, as in the BLBA and LHWCA, the claimant retains the burden of persuasion on the facts necessary to invoke those presumptions:

> The burden of proving his case beyond speculation and conjecture is on the claimant. This means that claimant must establish the work-connection of his injuries, the causal relationship between a work-connected injury and his disability, the extent of his disability, and all the other facets of his claim by a preponderance of the evidence; *he cannot prevail if the evidence is merely evenly balanced.* Although he is aided, in some jurisdictions, by presumptions that help to supply the minimum evidence necessary to support an award, he must first establish the facts required to invoke the presumption.

3 A. Larson, *The Law of Workmen's Compensation* § 80.33(a), at 15-864 - 15-871 (1993) (citing cases from numerous jurisdictions; emphasis added).

At common law, the party seeking the affirmative bears the burden of proof (i.e., persuasion) on that issue.[9] The burden of production might shift during the course of the

---

[9] Wigmore notes that this is "not an invariable test" because the plaintiff often must prove a negative, such as the nonperformance of a contract. 9A *Wigmore on Evidence* § 2486, at 288. Even in such cases, however, the burden of persuasion is on the party seeking relief. The rule is thus better understood as assigning the burden of persuasion to the party seeking a change to the status quo. That there are exceptions even to this rule does not change the fact that this general principle formed the background from which Congress legislated. See also *supra* n.5, discussing the determination of the "proponent" under APA section 7(c).

adjudication, but the ultimate burden of persuasion remains with the party asserting the affirmative:

> The weight of the evidence, or, as it is otherwise expressed, the preponderance of the evidence, may vary from side to side as a trial progresses; but the burden, which rests upon the plaintiff to establish the material averments of his cause of action by the preponderance of all of the evidence, never shifts. The party who maintains the affirmative of an issue carries the burden of proof through the whole case, although he may be aided by such a rebuttable presumption of law, or such facts as would prima facie support this contention. *His opponent need do no more than counterbalance the presumption or prima facie case.*

Ginn v. Dolan, 90 N.E. 141, 142 (Ohio 1909) (emphasis added). Accord *Arthur v. Unkart*, 96 U.S. 118, 122 (1877) ("The burden of proof is upon the party holding the affirmative of the issue. . . . [T]he other party shall be presumed to be innocent until proved to be guilty.") (internal quotations omitted); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 547 (9th Cir. 1950); *Smith v. Hill*, 122 N.E. 310 (Mass. 1919), *aff'd*, 260 U.S. 592 (1923); *Nikitiuk v. Pishtey*, 219 A.2d 225, 229 (Conn. 1966).

It is not surprising, in light of this established principle and the ordinary meaning of "burden of proof," that, prior to *EDF* and *Transportation Management*, this Court and other federal courts recognized that section 7(c) assigns the burden of persuasion. In *American Trucking Ass'n v. United States*, 344 U.S. 298 (1953), the Court held that section 7(c) was not applicable to the administrative action at issue, but assumed that section 7(c) placed on a proponent the burden of persuasion:

> Appellants . . . point to the requirement of § 7(c), that "the proponent of a rule or order shall have the burden of proof", and insist that the Commission . . . did not satisfy this burden by preponderating evidence.

> But even assuming that the Commission was a statutory "proponent" of the regulation and that it did not actively introduce the requisite degree of proof in support of its position, we think it plain that the requirement is inapplicable to the instant proceedings.

Id., at 318-319.

Steadman v. SEC, 450 U.S. 91 (1981), is even more to the point. The Court determined in that case that section 7(c) requires factfinding by a preponderance of the evidence. In its statement of the question, the Court plainly assumed that section 7(c) assigns the burden of persuasion. The Court declared that it was to determine "the degree of proof which must be adduced by the *proponent of a rule or order to carry its burden of persuasion* in an administrative proceeding." *Id.*, at 95 (emphasis added). Other federal courts reached the same conclusion about section 7(c). E.g., *NLRB v. Atlanta Coca-Cola Bottling Co.*, 293 F.2d 300, 309 & n.15 (5th Cir. 1961); *United States v. Springer*, 491 F.2d 239, 242 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974).[10] Judge Friendly, in *Kerner v. Flemming*, 283 F.2d 916, 921-922 (2d Cir. 1960), found the matter so plain that he assumed "We may agree that . . . under

[10] The *EDF* court distinguished these decisions with the summary assertion that the cases "appear to think of 'burden of proof' as the burden of producing evidence." 548 F.2d, at 1013. This is demonstrably false. In *Atlanta Coca-Cola*, the Fifth Circuit recognized explicitly that the NLRB General Counsel retains the "burden of proof" even if the employer may have a burden of production to rebut the General Counsel's prima facie case. 293 F.2d, at 309 n.15 ("Although the burden of going forward with evidence to rebut a prima facie case rests on the employer, the burden is not on the employer to show the absence of discrimination; it is on the General Counsel to show its presence").

Springer is to the same effect. The court there explained that only *after* the government has presented a prima facie case of invalidity of a mining claim does section 7(c) place the burden of proof on the claimant as "proponent" to establish that the claim is valid. 491 F.2d, at 242. The claimant's burden in such cases must be more than producing evidence to balance the government's case, or there would have been no need for the Ninth Circuit to hold that the claimant is the "proponent" under section 7(c).

§ 7(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1006(c), an applicant for a disability pension has the ultimate burden of persuasion."[11]

These cases all decided the matter correctly, consistent with the plain language of APA section 7(c).

C. The Legislative History of APA Section 7(c) Supports the Understanding That "Burden of Proof" Includes the Burden of Persuasion.

"Burden of proof" was not the original phrase Congress used in section 7(c) of the APA. An earlier version of the bill, H.R. 1203, provided:

> The proponent of a rule or order shall have the *burden of proceeding* except as statutes otherwise provide.

H.R. 1203 § 7(c), 79th Cong., 1st Sess. (emphasis added) (reprinted in *Legislative History of the Administrative Procedure Act* ("*Legislative History*"), S. Doc. 248, 79th Cong., 2d Sess. 158 (1945)). Congress changed "burden of proceeding" to "burden of proof" before it passed the APA. This was a transformation by design. If Congress meant to assign only the burden of production in section 7(c), the change from the unequivocal "burden of proceeding" to "burden of proof," which ordinarily encompasses more than merely producing evidence, would have been worse than meaningless, it would have been counterproductive. This statutory alteration alone is a strong signal that "burden

[11] The *EDF* court's attempt to distinguish *Kerner* fails as well. The D.C. Circuit noted that footnote 8 of *Kerner* proclaims that "Congress has often spoken far more clearly when it has desired to fix a burden of proof. [citing statutes]" The *EDF* court read this footnote as an assertion that *Kerner* did not find APA section 7(c) to contain such a clear statement. 548 F.2d, at 1014 n.5. In fact, footnote 8 of *Kerner* is appended not to a citation to section 7(c), but to a citation to provisions of the Social Security Act, 42 U.S.C. §§ 416(i)(1) & 423(c)(2), provisions that do not contain the phrase "burden of proof." That the *Kerner* court found section 7(c) to provide a clear statement is certain from the statutory sections *Kerner* listed as examples of Congress' clear statements: provisions of the Internal Revenue Code, discussed *supra*, that use the phrase "burden of proof."

of proof" in section 7(c) means something more than burden of proceeding. Compare the Communications Act of 1934, quoted *supra* at 11.

But the legislative history contains further support. A 1945 Senate Judiciary Committee Print presents the language of H.R. 1203, together with the text of the APA as passed, and explains the "shifts of language from one provision to another." *Legislative History* at 11. Regarding section 7(c), the Committee Print explains that "The provision relating to the burden of proof is the standard rule." *Id.*, at 31. In a context in which the most common meaning of the phrase "burden of proof" included the burden of persuasion, the traditional rule placed the burden of persuasion on the proponent, and Congress had changed the language from "burden of proceeding" to "burden of proof," there is nothing else that the "standard rule" could mean except that APA section 7(c) assigns the burden of persuasion to the proponent.[12]

---

[12] The Attorney General reached this conclusion as well. In his statement regarding the Committee Print of October 5, 1945, the Attorney General asserted that "The first sentence [of section 7(c)] states the customary rule that the proponent of a rule or order shall have the burden of proof." *Legislative History* at 411.

Petitioner, as well as the court in *EDF*, point to a later statement in the *Attorney General's Manual on the Administrative Procedure Act* (1947). The Attorney General, relying entirely on the same legislative history the *EDF* court relied upon, there asserted that "There is some indication" that "burden of proof" was not intended in any "strict sense" but as synonymous with the burden of going forward. *Id.*, at 75. Petitioner implies that the Court should defer to this "interpretation" of the APA from the Attorney General. Petitioner's Brief at 38 n.22.

There is nothing in the *Attorney General's Manual* to which the Court can defer. The Attorney General reached no conclusion regarding "burden of proof," but stated only that there is "some indication" that it refers to the burden of going forward. The next sentence of the *Manual*, which begins "In either case," evinces the Attorney General's uncertainty. Nor is this the type of statement to which this Court owes any deference. The Attorney General's assertion regarding the burden of proof involved no independent policy judgment nor any special expertise; this Court is fully capable of discerning legislative history. See

The D.C. Circuit's analysis in *EDF* is based entirely on another reading of the legislative history. The *EDF* court, like the petitioner here, relied on the following statement from the Senate Judiciary Committee Report on the APA:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence. Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper.

Legislative History at 208. The House Judiciary Committee Report contains identical language, as well as this additional explanation:

> In other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor; and in determining applications for licenses or other relief any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly

---

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

credited evidence or by facts officially noticed and stated.

Legislative History at 270.

The *EDF* court explained, quite correctly, that these statements are "concerned with the proponents being required to shoulder the burden of producing evidence." 548 F.2d, at 1015. That court erred when it leapt from this fact about a particular passage of legislative history to the conclusion that *APA section 7(c)* is concerned only with the burden of producing evidence. That Congress intended section 7(c) to address issues of burden of production does not mean that section 7(c) has nothing to say about burden of persuasion. The *EDF* court's extrapolation from one piece of legislative history required it to ignore the ordinary meaning of "burden of proof," ignore historic practice, and ignore the powerful additional legislative history indicating that "burden of proof" includes the burden of persuasion.

There is another reading of the Judiciary Committee Reports that is consistent with all of the evidence regarding "burden of proof" in APA section 7(c). Indeed, the Committee Reports describe a system identical to the traditional burdens. The quoted passages from the Committee Reports are concerned solely with the burden placed on the opponent in administrative hearings. The Committees plainly were concerned with those administrative cases in which the "proponent" sought a license or other privilege from the government. In such cases, the government would not be allowed "to stand mute and disbelieve credible evidence." Rather, the proponent's establishment of a prima facie case places the burden on the government (or any other opponent of a rule or order) to come forward with evidence to the contrary. If the government is unable to rebut the prima facie case, the proponent is entitled to prevail on the strength of the prima facie case alone; a prima facie case supported by "credible and credited evidence must be accepted as true" unless it has been rebutted.

The foregoing describes the entirety of the quoted passages from the Committee Reports. Those Reports simply do not address the issue of the ultimate burden of persuasion; the plain language of the statute and other legislative history accomplish that. Taken together, the language and legislative history establish that APA section 7(c) describes the "standard rule" on burden of proof. Under section 7(c), as under the traditional scheme, the proponent has the burden of persuasion. The proponent also has the initial burden of coming forward with sufficient evidence to establish a prima facie case. Ultimately, the proponent will prevail only if the preponderance of the evidence is in its favor; the proponent must meet its burden of persuasion.[13] See *Ginn*, 90 N.E., at 142, and other cases cited *supra* at 13.

II

APA SECTION 7(C) IS FULLY APPLICABLE TO THESE CASES

Petitioner argues in the alternative that APA section 7(c) does not apply to benefit claims under the BLBA and LHWCA because certain provisiors of those statutes supersede section 7(c). Petitioner reaches that result only by a misreading of statutory and regulatory language. Nothing in the BLBA or LHWCA supersedes section 7(c). The burden of persuasion the APA assigns to proponents is fully applicable to these cases.

---

[13] This is, of course, precisely the system this Court recently reaffirmed for claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* That statute places the burden on the plaintiff to establish a prima facie case. The defendant then must rebut the prima facie case, or suffer judgment in favor of plaintiff. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748 & n.3 (1993). Despite this shifting burden of production, the plaintiff at all times retains the burden of persuasion on the ultimate issue of discrimination. *Id.*, at 2749. The passages from the Judiciary Committee Reports regarding APA section 7(c) could just as easily apply to Title VII.

A. The BLBA Regulation Petitioner Relies Upon Is Grossly Insufficient To Supersede the APA.

Section 422(a) of the BLBA, 30 U.S.C. § 932(a), incorporates certain provisions of the LHWCA, including 33 U.S.C. § 919(d), which in turn incorporates APA section 7(c). The incorporation in BLBA section 422(a) is subject to an exception where "otherwise provided in this subsection or by regulations of the Secretary." Petitioner contends that section 718.3(c) of the BLBA regulations, 20 C.F.R. § 718.3(c), triggers this exception and prevents application of APA section 7(c) to BLBA adjudications. Petitioner's Brief at 43-45. Section 718.3(c) provides:

> In enacting [the Black Lung Benefits] Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

Petitioner concedes that "Section 718.3(c) is not the original source of the 'true doubt' rule," Petitioner's Brief at 29, but argues nonetheless that this regulation provides a sufficient statement of the rule to overcome the application of APA section 7(c), which otherwise would place the burden of persuasion on the claimant. Section 718.3(c) is a slender reed upon which to base a supersedure argument.

It would take an act of interpretive legerdemain to find the true doubt rule in this internally inconsistent regulation. The third sentence of section 718.3(c) appears plainly to require that the claimant establish entitlement to benefits by a preponderance of the evidence. That sentence requires that the "record considered as a whole," which must include opposing evidence, provide a "reasonable basis" for determining that the claimant is eligible for benefits. The only way the entire record can provide a "reasonable basis" for finding any fact is if the evidence weighs in favor of that fact; when the evidence is in equipoise, it is not reasonable to conclude that a fact has been established.

Sentence one of section 718.3(c), on the other hand, imposes a very different, and irreconcilable, burden of proof. Taken literally, this sentence would impose on the employer in BLBA benefit cases a burden akin to that the government bears in criminal trials: to prove beyond a reasonable doubt that the claimant is *not* entitled to benefits. Petitioner understandably does not argue for such a rule, but petitioner also fails to explain how this sentence, or any other part of section 718.3(c), leads one to the true doubt rule.

Petitioner's concocted interpretation of section 718.3(c) falls far short of the showing necessary to overcome application of APA section 7(c) to the BLBA. Section 12 of the APA commands that a "[s]ubsequent statute may not be held to supersede or modify [section 7(c), among others] except to the extent that it does so expressly." 5 U.S.C. § 559. To override section 7(c) of the APA, a statute must state explicitly, in clear language, Congress' intent to do so. *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962); *Brownell v. Tom We Shung*, 352 U.S. 180, 185 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *Ass'n of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 686 (D.C. Cir. 1984) (Scalia, J.).

BLBA section 442(a) does not provide such an express statement of supersedure. Rather, that statutory section provides only that other parts of the statute or regulations *may* preclude incorporation of several different LHWCA (and consequently APA) provisions. To meet the section 12 requirement, therefore, any such statutory section or regulation must, at a minimum, provide an express state-

ment of supersedure.[14] It is difficult to imagine supersedure language *less* express or clear than 20 C.F.R. § 718.3(c). Not only does that regulation not mention section 7(c) or burden of proof, it makes no sense.

B. Nothing in the LHWCA Is Inconsistent with the Burden of Proof in Section 7(c).

Petitioner contends that the LHWCA eschews any statutorily-defined burden of proof. LHWCA section 23(a), 33 U.S.C. § 923(a), provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; . . .

According to petitioner, this provision is contrary to the burden of proof requirements of APA section 7(c), and therefore supersedes that section pursuant to the "otherwise provided by statute" exception in section 7(c). Petitioner's Brief at 45-47. Petitioner is wrong about both the meaning and effect of LHWCA section 23(a).

Petitioner notes the apparent circularity between LHWCA section 23(a) and APA section 7(c): Section 7(c) assigns a burden of proof, except as otherwise provided by statute. Section 23(a) voids formal rules of evidence and procedure, except as provided in that chapter of the LHWCA. That chapter of the LHWCA incorporates APA section 7(c). See 33 U.S.C. § 919(d). Petitioner would break the circularity in favor of section 23(a), but provides no explanation for this arbitrary choice other than that it

[14] Some courts have questioned whether the Secretary of Labor has any authority at all to issue regulations inconsistent with the incorporated LHWCA provisions. See *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 273-274 (5th Cir. 1979); *Director, OWCP v. Peabody Coal Co.*, 554 F.2d 310, 341 (7th Cir. 1977). Even if the Secretary has such authority, however, any regulations issued pursuant to section 442(a) that purport to supersede APA section 7(c) must meet the express statement requirement.

would prevent "the entire argument [from] becom[ing] circular." Petitioner's Brief at 46.

In fact, there is no circularity. The LHWCA definitively tips the balance in favor of APA section 7(c). Section 19(d) of the LHWCA, 33 U.S.C. § 919(d), does more than simply incorporate the relevant APA provisions. That section declares that APA provisions are to apply to LHWCA benefit hearings "*[n]otwithstanding any other provisions of this chapter.*" 33 U.S.C. § 919(d) (emphasis added). The LHWCA thereby mandates that section 23(a) and other provisions of that chapter of the LHWCA are not to be read to supersede application of the relevant APA provisions, including section 7(c).[15] Yet that is precisely what petitioner attempts to do.

There is also no circularity between LHWCA section 23(a) and APA section 7(c) because there is no inconsistency between the rule in section 23(a) and the burden of proof assigned by section 7(c). Petitioner assumes without justification that the rejection of formal rules of evidence and procedure in section 23(a) sweeps away the burden of proof as well. To the contrary, it is beyond dispute that the assignment of the burden of proof to one party or another is not a rule of evidence or procedure, but a rule of substantive law. E.g., *American Dredging Co. v. Miller*, 114 S. Ct. 981, 988 (1994); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939); *Central Vermont R. Co. v. White*, 238 U.S. 507, 512 (1915); *CIR v. Bain Peanut Co.*, 134 F.2d 853, 857 (5th Cir. 1943). See generally 9A *Wigmore on Evidence* § 2485, at 286 n.4 ("It is . . . a fallacy to suppose that the necessity of apportioning the burden of proof is a 'technical, formal, legal' doctrine"). LHWCA section 23(a) simply has nothing to say about the burden of proof.

[15] See also 20 C.F.R. § 702.339 ("In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, *except as provided by 5 U.S.C. 554*") (emphasis added).

The federal courts have long understood that the language in section 23(a) is concerned primarily with rules of evidence and the admissibility of proof; claimants are not to be restricted in making their case by the hearsay rule and other technical rules of evidence or procedure. E.g., *Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 1344 (8th Cir. 1984); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1121-1122 (5th Cir. 1980); *Tampa Ship Repair & Dry Dock Co., Inc. v. Director, OWCP*, 535 F.2d 936, 938 (5th Cir. 1976); *Southern Stevedoring Co., Inc. v. Voris*, 190 F.2d 275, 277 (5th Cir. 1951). Indeed, the APA incorporates these same principles. E.g., *Richardson v. Perales*, 402 U.S. 389, 409-410 (1971); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986). This relaxation of the rules for putting on proof is independent of the substantive issue of which party ultimately is required to convince the factfinder. " 'No amount of informality can alter the elementary requirement that the claimant allege and prove the substance of all essential elements of his case.' " *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 614 n.7 (1982) (quoting 3 A. Larson, *The Law of Workmen's Compensation* § 78.10, at 15-12 (1976)).

The language in section 23(a) derives from New York's original workers' compensation law; nearly identical language appears in most state workers' compensation statutes. 2B A. Larson, *The Law of Workmen's Compensation* § 79.30, at 15-426.100 (1993). The state courts understand that the rejection of rules of evidence does not disturb the burden of proof, which remains on the claimant:

> The provision[] . . . to the effect that the commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure . . . sweep[s] away procedural technicalities, to the end that claimants may be afforded the protection intended by the act . . . but they do not dispense with proof of the employe's [sic] claim. On the contrary, they impose upon him the imperative duty of proving his case by 'competent evidence.' To hold otherwise

> would amount to taking money from one person and giving it to another without any legal basis for doing so.

Lappinen v. Union Ore Co., 29 N.W.2d 8, 15-16 (Minn. 1947) (internal citations omitted). See generally 2B *Law of Workmen's Compensation* § 79.30. So too does the true doubt rule give benefits to claimants without proof of entitlement.

III

TRUE DOUBT IS AN UNFAIR AND UNWARRANTED RULE THAT UNDERMINES THE REASONED ADJUDICATION OF BENEFITS CLAIMS

If the true doubt rule worked as petitioner claims, the question these cases present would not be worthy of this Court's attention. According to petitioner, the true doubt rule "provides only that when an adjudicator finds the evidence on both sides of point evenly balanced . . ., uncertainty should be resolved in favor of the claimant." Petitioner's Brief at 18-19. If, in fact, the rule served solely as a "tie-breaker" in the extraordinary instance where evidence is in equipoise, the rule would still violate APA section 7(c), but it would be of little, if any, practical significance. In practice, however, the true doubt rule is not reserved for the extraordinary case of equipoise. Rather, ALJs invoke the rule frequently in abrogation of their responsibility to decide the issues before them, and as a license to award benefits irrespective of the merits of the claim.

Federal and state courts recognize that it is "a rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise." *United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). See also *Medina v. California*, 112 S. Ct. 2572, 2579 (1992) (allocation of the burden of proof affects only "a narrow class of cases where the evidence is in equipoise"); *People v. Bilyew*, 383 N.E.2d 212, 215 (Ill. 1978) (it is "rare"

that evidence "is so nicely balanced" that it can be deemed in equipoise); *Preston v. Keith*, 584 A.2d 439, 443 n.8 (Conn. 1991) ("the allocation of the burden of proof determines which party prevails on an issue only in the relatively rare case where the factfinder concludes that the evidence on that issue is in equipoise"). In the overwhelming majority of cases, there will be some factor by which the factfinder can determine that the evidence on one side or the other preponderates. As one state supreme court justice put the matter, "it may be that there have been, or will be, cases in which the evidence is in perfect equipoise .... But I am not sure I have ever seen such a case in over twenty years on the bench." *Miller v. Leonard*, 588 So.2d 79, 84 (La. 1991) (Hall, J., concurring).

Despite the obvious rarity of true equipoise, ALJs determining eligibility for benefits under the BLBA and LHWCA declare the evidence in absolute balance with remarkable regularity. Indeed, recent volumes of the *Black Lung Reporter* are filled with administrative cases invoking the true doubt rule on one issue or another.[16] Far from a once-in-a-career experience, some ALJs issue decisions invoking the true doubt rule multiple times each year.[17]

---

[16] See, e.g., *Gasperetti v. Director, OWCP*, 16 BLR 3-956, 3-959 (1992); *Kennedy v. Shannon Pocahontas Mining Co.*, 16 BLR 3-942, 3-947 (1992); *Kintzel v. Kintzel Coal Co.*, 16 BLR 3-841, 3-848 (1992); *McGlone v. Maiden Mining, Inc.*, 16 BLR 3-717, 3-721 (1992); *Pupo v. State Coal Co.*, 16 BLR 3-685, 3-691 (1992); *Griffiths v. B-D Mining Co.*, 16 BLR 3-673, 3-682 (1992); *Smith v. Peabody Coal Co.*, 16 BLR 3-622, 3-628 (1992); *Shaff v. U.S. Steel Mining Co.*, 16 BLR 3-612, 3-616 (1992); *Willinsky v. Director*, OWCP, 16 BLR 3-536, 3-540 (1992); *Artz v. A&H Coal Co.*, 16 BLR 3-192, 3-197 (1992); *Sanson v. Director, OWCP*, 16 BLR 3-183, 3-189 (1992); *Poff v. Westmoreland Coal Co.*, 16 BLR 3-53, 3-60 (1991); *Beal v. Director, OWCP*, 15 BLR 3-297, 3-301 (1991); *Sutherland v. Clinchfield Coal Co.*, 14 BLR 3-862, 3-865 (1991); *Nickles v. Tackett & Manning Coal Co.*, 14 BLR 3-827, 3-830 (1991).

[17] See, e.g., *Nickles v. Tackett & Manning Coal Co.*, 14 BLR 3-827, 3-830 (1991) (ALJ Gilday); *Stills v. Pyro Mining Co.*, 14 BLR 3-834, 3-847 (1991) (ALJ Gilday); *Slone v. Wolf Creek Collieries*, 15 BLR 3-430, 3-441 (1991) (ALJ Gilday); *Mills v. Plastics Universal Corp.*, 15 BLR 3-838, 3-844 (1991) (ALJ Gilday).

It is highly doubtful that true equipoise, which is such a rarity in all other areas of jurisprudence, is commonplace in benefits cases under the BLBA and the LHWCA. The inordinate invocation of true doubt in BLBA and LHWCA cases is, in itself, a strong indication that the rule is nothing more than a convenient mechanism for ALJs to avoid making difficult decisions.

Greenwich Collieries is a perfect example. Petitioner asserts that the ALJ in that case properly applied the true doubt rule to resolve "conflicting evidence of the existence of pneumoconiosis." Petitioner's Brief at 33 n.20. At the same time, petitioner confesses error on another issue, declaring that the "ALJ's opinion does not ... reflect an adequate evaluation or weighing of the evidence concerning whether the claimant was totally disabled. The ALJ therefore did not properly justify her resort to the 'true doubt' rule." *Id.*, at 34 n.20. Petitioner's failure even to hint at how it decided whether the ALJ "permissibly applied the 'true doubt' rule" on either issue is a revealing example of the lawless nature of the true doubt inquiry.

The true doubt rule is in fact a highly subjective test that leads to arbitrary and unfair results. As such, the rule is directly contrary to a fundamental purpose of the APA, which was intended to create uniform and predictable standards of administrative adjudication. See, e.g., *Attorney General's Manual on the Administrative Procedure Act* at 9 (1947) (one of the "four basic purposes" of the APA is to "prescribe uniform standards for the conduct ... of adjudicatory proceedings").

The BLBA and LHWCA serve the same purpose. Those acts are not simple remedial statutes intended solely for the benefit of employees. Like all workers' compensation schemes, these laws provide indemnity and medical benefits on a no-fault basis, in exchange for the employee's relinquishing the right to sue the employer in tort. In so doing, these workers' compensation programs provide a system of quick and predictable adjudications:

> [The LHWCA] was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for *limited and predictable liability*. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort action entails.

Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 636 (1983) (emphasis added).

The true doubt rule undermines predictability and fairness in adjudication. Such inequity is not justified by a reflexive characterization of the BLBA and LHWCA as "remedial." Most statutes, including all state workers' compensation laws, are remedial. That the BLBA and LHWCA benefit injured employees does not warrant the arbitrariness that results from permitting a party to change the status quo without meeting its burden of proof.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Court of Appeals.

Respectfully submitted,

CRAIG A. BERRINGTON
BRUCE C. WOOD
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

*WILLIAM J. KILBERG
THEODORE J. BOUTROUS, JR.
MARK SNYDERMAN
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amicus Curiae

**Counsel of Record*